FILE COPY

FILED
NOV 24 1930

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR PETITIONER.

STANLEY S. GILLAM,
Attorney for Petitioner,
535 Metropolitan Bank Bldg.,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

SUBJECT INDEX

	Page
The Judgment of the Circuit Court of Appeals for the Eighth Circuit Should be Reversed	1
Official Report of Opinion in the Court Below	2
Statement as to Jurisdiction	2
Statement of the Case	3
Contentions of Petitioner	8
Specifications of Error	10
Summary of the Argument	13
Argument	23-83
I. The Check Was Delivered and Accepted in Full and Final Payment of the Freight Bill	23
II. The Railroad Company Treated the Freight Bill as Paid	26
III. The Long Continued Prior Conduct of the Railroad Company Was to Accept Checks in Full Payment of Freight Bills	27
IV. The Sole Cause of the Failure of the Railroad Company to Obtain Currency on the Check Was Its Own Negligence, Its Disregard of the Duty of Prompt Presentation, Which It Owed to the Fullerton Company as Drawer Thereof	29
V. Under the Circumstances Disclosed in the Case at Bar, It is Settled Law That the Check Was Accepted in Unconditional Payment	42
VI. The Constitutional Immunity of Sovereign States Does Not Cover a Railroad: Eggleston vs. Plowman Does Not Apply	49
VII. The Device Which the Railway Company Seeks to Use to Prevent the General Rules of Law Applicable to Others from Governing Its Own Conduct and to Escape Responsibility for the Consequences of Its Own Acts is the Interstate Commerce Commission Ruling Regarding Freight Charges and an Attempted Extension of the Rule of Law That Freight Bills Cannot Be Compromised by Delivery of Something of Uncertain Value. That Ruling and That Rule of Law Do Not Govern This Case	55
VIII. Adoption of Respondent's Views Would Annul the Law Merchant and Result in Great Inconvenience in the Transaction of Modern Business	68
IX. The Words on the Check, "Collectible at Par Through Federal Reserve Bank at Minneapolis," Are No Justification for Respondent's Failure to Promptly Present the Check for Payment	70
X. The Trial Court Should Have Granted Defendant Leave to Interpose in This Action Counter-claim for the Loss Caused by Respondent's Wrongful Acts	75
XI. The Dictates of Substantial Justice and Fair Dealing Require a Decision in Petitioner's Favor	82

Appendix. Reply to Statement by Letter Addressed to the Court by Counsel for Respondent ..... I-VIII

TABLE OF CASES.

Pages

Abeles vs. Guelick, 101 N. J. E. 180, 137 Atl. 856 (1927) 20, 62, 65, 66
Adams Express Co. vs. Albright Bros., 75 Pa. Super. Ct. 410 ... 23, 80
Andrew vs. Hartley State Bank, 207 Iowa 407, 219 N. W. 929 (1928) 20, 61
Andrew vs. State Bank of Dexter, 204 Iowa 565, 215 N. W. 742 (1927) 20, 62
Bartholomew vs. Emerson-Brantingham Implement Co., 68 Colo. 244, 187 Pac. 538 ..... 13, 25
Barton vs. Gray, 57 Mich. 622, 24 N. W. 638 ..... 14, 31
Battle vs. Atkinson, 9 Ga. App. 488 ..... 22, 79
Bennett vs. Bank of Commerce and Trust Co., 220 Fed. 950 (Dist. Ct., N. D., Miss., 1914) 13, 20, 25, 62, 65
Billings vs. State, 27 Wash. 288, 67 Pac. 583 ..... 18, 51
Braun vs. Cox, 202 Iowa 1244, 211 N. W. 891 ..... 16, 43, 44
Campbell vs. Shark, 46 Idaho 278, 267 Pac. 458 ..... 16, 43, 45
Central of Georgia Ry. Co. vs. Birmingham Sand & Brick Co., 9 Ala. App. 419 ..... 22, 79
Chicago, Indianapolis and Louisville Railway Company vs. United States, 219 U. S. 486 ..... 19, 59
C. M. & St. P. Ry. Co. and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the C. M. & St. P. Ry., vs. Bradshaw, Circuit Court of Brule County, South Dakota 67
C. M. & St. P. Ry. Co. vs. Pioneer Grain Corp., 26 F. (2d) 90 (Dist. Ct., Minn., Judge John B. Sanborn) 22, 79
Chicago & Northwestern Railway Company vs. Lindell, 281 U. S. 14 ..... 2, 22, 77, 75, 79
C. & N. W. Ry. Co. vs. Stein Co., 233 Fed. 716 (D. C., Neb., Judge Munger) 23, 80
C. & N. W. Ry. Co. vs. Tecktonius Mfg. Co., 262 Fed. 715 (D. C., E. D., Wis., Judge Geiger) 22, 79
Chicago, Rock Island & Pacific Railway Company vs. Fullerton Lumber Company, District Court of Pocahontas County, Iowa 67
City of El Paso vs. Two Republics Life Insurance Company, Texas Civil Appeals, 1926, 278 S. W. 231 ..... 20, 60
Clodfelter vs. State, 86 N. C. 51 ..... 18, 51
Davis vs. Akron Feed & Milling Company, 296 Fed. 675 (C. C. A., 6th Cir., 1924) 15, 19, 34, 35, 41, 57
Davis vs. Mobile R. Co., 194 Fed. 374 (C. C. A., Fifth Cir., 1912) 13, 27
D. L. & W. R. R. Co. vs. Nuhs, 93 N. J. Law 309 ..... 23, 80
Duhne vs. New Jersey, 251 U. S. 311 ..... 17, 50
Eggleston vs. Plowman, 49 S. D. 609, 207 N. W. 981 .. 11, 17, 49, 51, 54
Ex Parte State of New York, 256 U. S. 490 ..... 17, 51
Federal Land Bank vs. Barrow, 189 N. C. 303, 127 S. E. 3 ..... 16, 47
Fitts vs. McGhee, 172 U. S. 516 ..... 17, 51, 52
Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 36 Fed. (2d) 180 ..... 2, 22, 75, 79
Hampton vs. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A. L. R. 1456, Note 18, 51
Hinckley vs. Pittsburgh Bessemer Steel Co., 121 U. S. 264 ..... 14, 31
Illinois Central R. Co. vs. Hoopes, 233 Fed. 135 (D. C., S. D., Iowa, Judge Wade) 23, 80
Johnson-Brown Co. vs. Railroad, 239 Fed. 590 (D. C., S. D., Georgia, Judge Speer) 23, 80
Kirkpatrick vs. Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785 ..... 16, 47
Lewis vs. State, 96 N. Y. 71 ..... 18, 51, 53

Lloyd Mortgage Co. vs. Davis, 51 N. D. 336, 199 N. W. 869, 36 A. L. R. 465, and Note, 36 A. L. R. 471 ..... 16, 47
Looney vs. Stryker, 31 N. M. 557, 249 Pac. 112, 50 A. L. R. 1404 ..... 18, 51
Louisville & Nashville Railroad Company vs. Mottley, 219 U. S. 467 ..... 11, 19, 59
Luckenbach vs. McCahan Sugar Refining Co., 248 U. S. 139 ..... 13, 25
Manitoba Mortgage & Investment Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37 (1904) 15, 37, 42, 43, 47, 52, 54
McElwee vs. Bridgeport Land Co., 54 Fed. 627 (C. C. A., 5th Cir., 1893) 14, 31
McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542 ..... 15, 16, 42, 44
Messenger vs. Carroll Trust and Savings Bank, 193 Iowa 608, 187 N. W. 545 (1922) 20, 61
Michigan Central R. Co. vs. Piowaty, 36 F. (2d) 604 (D. C., N. D., Ill., Judge Woodward) 22, 79
Mills vs. Stewart, 76 Montana 429, 247 Pac. 332, 47 A. L. R. 424 ..... 18, 51, 52, 53
Montgomery County vs. Cochran, 121 Fed. 17 (C. C. A., 5th Cir., 1903) 20, 61, 62, 65
Morgan Paving Co. vs. Carroll, 211 Ala. 121, 99 So. 640 ..... 13, 25
Murdock Parlor Grate Co. vs. Commonwealth, 152 Mass. 28, 24 N. E. 854 ..... 18, 51, 53
N. Y. Central R. Co. vs. Federal Sugar Co., 201 N. Y. App. Div. 467 ..... 22, 79
Nashville, C. & St. L. Ry. vs. Tennessee Mill Co., 143 Tenn. 237 ..... 22, 79
New York Central & Hudson River Railroad Company vs. Gray, 239 U. S. 583 ..... 11, 19, 59
Northrop vs. Mercantile Trust Co., 157 Fed. 497 (C. C. A., 4th Cir., 1907) 14, 31
Nuzum vs. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024 ..... 16, 47
Palmer vs. Golden, 127 N. Y. Misc. 487, 216 N. Y. S. 509 ..... 20, 62, 65
Palmer vs. Ohio, 248 U. S. 32 ..... 17, 51
Payne vs. Clark, 271 Fed. 525 (D. C., S. D., Calif., Judge Bledsoe) 22, 79
Penn. R. Co. vs. Bellinger, 101 N. Y. Misc. Rep. 105 ..... 22, 79
Pennsylvania R. Co., vs. Olivit Brothers, 243 U. S. 574 ..... 19, 58
Pennsylvania R. Co. vs. South Carolina Produce Assn., 25 F. (2d) 315 (D. C., E. D., South Carolina, Judge Cochran) 22, 80
Quarles v. Taylor & Company, 195 N. C. 313, 142 S. E. 25 ..... 16, 46
Railroad Company vs. Alabama, 101 U. S. 832 ..... 17, 50
Railroad Company vs. Tennessee, 101 U. S. 337 ..... 17, 50
Smith vs. Reeves, 178 U. S. 436 ..... 17, 51, 52
Spokane Valley State Bank vs. Lutes, 133 Wash. 66, 233 Pac. 308 ..... 21, 71
Stanton vs. N. Y., etc., R. Co., 59 Conn. 272, 22 Atl. 300 ..... 14, 31
State vs. Field, 27 N. M. 384, 201 Pac. 1059 ..... 18, 51, 52
Taylor vs. Wilson, 11 Metcalf (Mass.) 44, 45 Am. Dec. 180 ..... 16, 47
Tobiason vs. First State Bank of Ashby, 173 Minn. 533, 217 N. W. 934 ..... 16, 42, 43, 44
Wells-Fargo & Co. vs. Cuneo, 241 Fed. 727 (D. C., S. D., N. Y., Judge Mayer) 22, 79, 80
White Eagle Oil, etc., Co. vs. Gunderson, 48 S. D. 608, 205 N. W. 614, 43 A. L. R. 397 ..... 18, 51

STATUTES CITED.

Page

Interstate Commerce Act, Title 49, U. S. C., Sec. 6, Par. 7..9, 19, 55, 56
Interstate Commerce Commission Conference Ruling No. 207, adopted September 15, 1906.....11, 19, 56, 58, 81, 82
Mason's Gen. Statutes of Minn., 1927, Secs. 9253, 9254..... 77, 78
United States Constitution, Eleventh Amendment..... 17, 50

TEXT BOOKS.

Bouvier, Law Dictionary, 3rd Ed., page 1882..... 21, 69
Circular No. 35, June 15, 1916, Fed. Reserve Bank of Minneapolis 21, 71
Circular No. 193, Jan. 15, 1920, Fed. Reserve Bank of Minneapolis 21, 72
Circular No. 227, Oct. 1, 1920, Fed. Reserve Bank of Minneapolis 21, 73
Circular No. 245, April 1, 1921, Fed. Reserve Bank of Minneapolis 21, 73
Circular No. 358, Jan. 1, 1927, Fed. Reserve Bank of Minneapolis 21, 73
1 Cooley, Constitutional Limitations, 8th Ed., pages 21-24, and cases cited 17, 50
10 Corpus Juris, 454, Sec. 718..... 13, 27
13 Corpus Juris, 647 ..... 14, 31
48 Corpus Juris, 585-587 ..... 13, 25
36 Cyc. 881 ..... 18, 51
21 Ruling Case Law, pages 60-62 ..... 15, 42
21 Ruling Case Law, pages 66-67, and cases cited..... 16, 42
21 Ruling Case Law, "Payment," Sec. 65, page 66..... 16, 47
25 Ruling Case Law, page 413 ..... 17, 50

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR PETITIONER.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT SHOULD BE REVERSED.

The judgment of the Circuit Court of Appeals for the Eighth Circuit in this case is contrary to well settled rules of law applicable to negotiable instruments and defining the duty of a holder of a check received in payment of an indebtedness to make prompt presentment thereof for payment to the bank upon which it is drawn. The judgment is likewise contrary to the well settled practice under Minnesota statutes, of allowing counter-claims arising out of or connected with the subject-matter of an action to be pleaded by way of set-off, reducing or cancelling the amount of re-

covery. The decisions below are in conflict with the recent ruling of this Court in *Chicago & North Western Railway Company vs. Lindell*, 281 U. S. 14, decided February 24, 1930. Their reasoning takes certain provisions of the Interstate Commerce Act and it's amendments, and a ruling of the Interstate Commerce Commission thereunder designed to prevent unfair discrimination or favoritism in transportation charges, out of their proper setting, and so applies these provisions as to completely abrogate and nullify the force and effect of well-settled rules of law otherwise clearly applicable to protect petitioner from the asserted liability. The effect of that reasoning is to immunize respondent from any responsibility for the adverse effects of its own negligent acts. It is our position that there is no necessity, logical or practical, for such an application of the provisions of the Interstate Commerce Act, and that such an abrogation of salutary rules of general law is unwarranted.

OFFICIAL REPORT OF OPINION IN THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in *Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 36 Fed. (2d) 180.

The opinion of the District Court, Charles A. Dewey, Judge, is not reported, but is printed at pages 12-14 of the Record.

STATEMENT AS TO JURISDICTION.

Statement of the grounds of this Court's jurisdiction is made at pages 23-24 of our brief in support of Petition for Writ of Certiorari.

STATEMENT OF THE CASE.

The case comes to this Court on Petition for Writ of Certiorari, filed February 14, 1930, directed to the judgment of the Circuit Court of Appeals for the Eighth Circuit (R. 84), rendered November 15, 1929, in favor of respondent, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and against petitioner, Fullerton Lumber Company, affirming the judgment of the District Court.

Certiorari was granted March 17, 1930 (R. 84).

The judgment of the District Court (R. 14) allowed recovery of the full amount sued for, $375.96, plus interest and costs. That judgment was entered on November 22, 1928, in an action at law tried before Honorable Charles A. Dewey, Judge, at St. Paul, Minnesota, on November 13, 1928.

The action was brought by the receivers of the Chicago, Milwaukee & St. Paul Railway Company to recover a freight charge of $375.96 alleged to be due for transporting a carload of coal from Norfolk, West Virginia, to Kimball, South Dakota, containing 104,000 pounds of coal and consigned to the Fullerton Lumber Company at Kimball (R. 1-4). The car was loaded in West Virginia, on June 9, 1926, and delivered at Kimball on June 16, 1926 (R. 16). The complaint alleged that the coal was duly transported and delivered and that no part of the freight charge had been paid.

The answer (R. 4) denied that the coal was duly transported, alleged that the carriage was negligent causing loss and damage which was paid for by the respondent, and then went on to deny that petitioner was indebted to respondent in any sum whatsoever, alleging that before the action was brought petitioner fully paid and satisfied and discharged the claim for freight alleged in the complaint, less a deduction on account of improper carriage.

The reply (R. 7) took issue with petitioner's allegation of payment, by alleging in detail that on Saturday afternoon, June 19, 1926, petitioner's agent at Kimball, South Dakota, delivered to respondent's agent at the same place petitioner's check No. 738, dated June 19, 1926, for the sum of $375.96, payable to respondent; that this check was duly presented to the Lumbard State Bank of Kimball, the bank upon which it was drawn, and the bank refused payment thereof. The reply further stated that respondent had never received any money on the check.

At the trial the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation, was substituted as party plaintiff (R. 10).

A stipulation was entered into waiving jury trial (R. 9-10), and the case duly came on for trial before Judge Dewey, without a jury. Forest T. Gustafson, the Milwaukee agent at Kimball, was called by respondent as its first witness (R. 16), and he testified to the shipment, that the car was delivered at the Fullerton Lumber Company yard at Kimball on June 17, 1926, and unloaded on the 19th, that he presented the freight bill for payment between the hours of two and three in the afternoon of June 19, 1926, to Mr. Yarosh, the Fullerton agent at Kimball, that Yarosh paid it by giving a Fullerton Lumber Company check for $375.96 upon the Lumbard State Bank of Kimball, and that he thereupon receipted the freight bill as paid and gave it to Yarosh (R. 17).

Instead of presenting the check for payment at the bank upon which it was drawn, at Kimball, on that same day, or before the close of business on the next business day, Monday, June 21st, the Railway Company's agent, Gustafson, sent the check by express, with other collections, on the eastbound 10:35 Sunday morning Milwaukee train, on June 20th, 1926, to Chicago for deposit. The check was not presented

for payment at the Lumbard State Bank of Kimball, the bank upon which it was drawn, until June 28, 1926, nine days after it had been delivered to the Railway Company's agent (R. 38, 55), and it was not honored by the bank, although at all times the Fullerton Lumber Company had on deposit sufficient funds to cover it (R. 38), for the reason that about noon on Friday, June 25, 1926, the bank closed its doors (R. 26). (In its brief in the Circuit Court of Appeals respondent asserted that the record did not show that June 28 was the date of presentment. But when the check, Exhibit C, was put in evidence by respondent it had attached to it the bank slip showing presentment and refusal on the 28th, as we recall it; and, at all events, it was after the bank closed on Friday noon of June 25; the next day, the 26th, was Saturday, the 27th was Sunday. Yarosh was first notified June 29 (R. 38).) If Mr. Gustafson, the Milwaukee agent, had immediately obtained from the bank the currency called for by the check, or if the bank had not closed its doors, the check would have been paid when it arrived and the controversy involved in this litigation would not have arisen. It does arise out of the circumstances by reason of which the currency or cash called for by the check was not obtained, after the check for the proper amount of money was delivered into the keeping of the Milwaukee Railway and its agent, and involves the question whether the Railway Company can escape responsibility for the negligent manner in which it handled the check after it received it on the ground that, being a common carrier, it is freed from the ordinary and usual responsibilities of individuals in a like situation. It is not denied that an individual is under the duty of presenting the check for payment on the same or next succeeding business day, but the railroad contends that a ruling of the Interstate Commerce Commission protects it from the

effect of the rules of law which ordinarily govern such a situation.

John Dickie, treasurer of the Milwaukee at Chicago, was the only other witness who testified on behalf of respondent (R. 30), and he stated that on June 16, 1926, three days before the check was delivered in payment of the freight bill, he had instructed Mr. Gustafson, as local agent at Kimball, to send checks drawn upon local banks there to the Central Trust Company of Illinois at Chicago for deposit (R. 28, 73, 33).

Mr. Yarosh, the Fullerton agent at Kimball, testified on behalf of petitioner that for a long time prior to June 19, 1926, he had, as a uniform practice, paid all freight bills owed to the Milwaukee by check on the Lumbard Bank of Kimball, that these checks had always been indorsed by Gustafson and presented for payment by Mr. Gustafson on the same or next succeeding business day, and that, on the occasion in question, he had had no notice from Mr. Gustafson that the check was to be handled in any different manner (R. 37, 39-40).

It is clear that all parties agreed and understood that the freight bill was paid when the check was delivered. Mr. Gustafson receipted the bill (R. 17-18), and some months later the Milwaukee confirmed this understanding by honoring and paying a claim for refund of a portion of the amount thus paid by giving its draft to the Fullerton Lumber Company for $4.26 (R. 35-36), which draft was paid. This draft was a refund of a portion of the sum of $375.96 previously paid by delivery of the check involved in this controversy.

There was practically no dispute in the testimony in any material particulars.

After hearing the testimony and considering various items of documentary evidence and exhibits in connection therewith, together with the arguments of counsel, Judge Dewey

rendered his decision (R. 12-14), finding in respondent's favor and requiring petitioner to pay the freight bill over again, on the ground that an Interstate Commerce Commission ruling, specifying that nothing but money can be lawfully received in payment of freight, precluded the railroad company from accepting the check and therefore the carrier was not bound by the ordinary rule requiring due diligence in presenting a check for payment (R. 14). The trial court reached this decision with reluctance, recognizing the Railway Company's negligence in dealing with the check, and made the decision expressly reserving to petitioner the right to bring a separate action against respondent for the loss resulting from failure of the railroad company to present the check for payment within a reasonable time (R. 14).

After entry of judgment, petitioner made a motion for amended findings or a new trial and for leave to file a counter-claim for damages for negligence in not properly presenting the check for payment (R. 53), and Judge Dewey made an order thereon sustaining the motion for amended findings in part (R. 55), but denying a new trial, and denying the motion for leave to file a counter-claim. The original findings stated that both parties knew the Lumbard State Bank of Kimball was not in the best of financial circumstances at the time of the execution of the check (R. 13), whereas there is nothing in the evidence to indicate that petitioner had any such knowledge, in fact the testimony shows conclusively that petitioner kept its funds on deposit there up to the hour of closing and dealt with it on the basis of full confidence (R. 38, 42, 45). Upon the motion for amended findings, the trial court changed his findings to read that respondent (instead of "both parties") was aware that the Lumbard bank was not in good financial circumstances at the time the check was given (R. 55).

The essence of the case is this: The Fullerton Lumber Company did its part by giving the Railway Company full power to get the currency; the Railway Company undertook to get it; the sole reason for its failure to obtain the currency was failure of the Railway Company to carry out this undertaking. Can the Railway Company now take advantage of its own wrong? Can it escape the normal consequences of such wrong by resort to an Interstate Commerce Commission ruling which does not in terms give such an immunity but which only, in terms and in intent, protects the public against discrimination?

Or, to put it more briefly, is there a privilege surrounding the operations of the carrier corporation in such a situation, which exempts it from the obligations of the common law, and of the Law Merchant, governing the actions of ordinary persons?

CONTENTIONS OF PETITIONER.

Petitioner insists:

(1) That the Court should have entered judgment in favor of petitioner, that respondent take nothing by its action, and for costs and disbursements.

(2) That when the carrier's agent took the check, it was thereafter within his power to obtain the currency upon it, and that thereafter it was not within the power of the Fullerton Company's agent to deal with or obtain currency upon the check.

(3) That after taking the check it was the duty of the carrier's agent to go directly to the bank and obtain currency upon it.

(4) That, by reason of his failure to do this and of his affirmative act in sending the check on a nine days' journey

to Chicago, he, and he alone, prevented the act of making and delivering the check from successfully resulting in the transfer of greenbacks or gold from the Fullerton Company to the railroad.

(5) That there is nothing in Paragraph 7 of Section 6 of the Interstate Commerce Act (U. S. Code, Tit. 49, Sec. 6, Paragraph 7, 49 U. S. C. A., Sec. 6 (7)), which affects the question; or which relieves the carrier from the necessary consequences of its own acts.

(6) That Interstate Commerce Commission Conference Ruling No. 207, providing that freight bills shall be paid in money, does not govern the case.

(7) That there is no Federal law precluding the use of checks as a mechanism for remitting money, nor abrogating the responsibilities of a holder of a check as determined by common and statute law.

(8) That there is no Federal law providing in terms or by implication that freight bills can only be paid by the immediate transfer of greenbacks, gold or silver.

(9) That to deny the right of counter-claim to petitioner, to be asserted in this action, greatly prejudices petitioner, and in substance allows respondent recovery on a cause of action which could not exist apart from respondent's own wrong. In any separate action to recover damages for that wrong, the evidence would be identical with the evidence in the case at bar.

(10) That the authorities cited in the opinions of the courts in this case opposing allowance of counter-claim do not involve the kind of counter-claim presented in the case at bar.

SPECIFICATIONS OF ERROR.

Petitioner urges all of the assignments of error and will argue and rely upon all of them in this brief. Said assignments of error are as follows:

Petitioner complains that the following errors were committed by the United States Circuit Court of Appeals for the Eighth Circuit:

(1) The Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court and in entering its judgment, dated November 15, 1929, to that effect, said judgment of the District Court so affirmed being as follows:

> "It is therefore the judgment and order of the Court that the plaintiff have and recover as against the defendant a judgment in the sum of $375.96, with interest thereon at six per cent from June 25, 1926, and costs of this suit. To all of which plaintiff excepts" (R. 14, 84).

(2) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the respondent was entitled to recover the amount claimed in the summons and complaint herein (R. 84).

(3) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the evidence and facts found by the District Court compelled the judgment (R. 83).

(4) The Circuit Court of Appeals for the Eighth Circuit erred in approving the conclusions stated by the trial court in its opinion, as quoted in the opinion of the Circuit Court of Appeals (R. 80).

(5) The Circuit Court of Appeals for the Eighth Cir-

cuit erred in approving the following finding of the District Court:

> "The foregoing rule of the Interstate Commerce Commission (referring to Interstate Commerce Commission Conference Ruling 207) has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. *. L. & N. Ry. Co. vs. U. S.*, 219 U. S. 468; *N. Y. C. & H. R. R. Co. vs. Gray*, 239 U. S. 583; *Eggleston vs. Plowman* (S. D.), 207 N. W. 981" (R. 14, 80-81).

(6) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for amended findings (R. 83), which motion came on to be heard on February 2, 1929, and which denial by the District Court was as follows:

> "In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied and the Court adheres to its views as set forth in said findings and decision, dated November 20, 1928, that said freight bill was not legally paid by said check therein referred to" (R. 55).

(7) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for a new trial of said action as set forth in the motion papers, dated January 5, 1929, which motion came on to be heard on February 2, 1929, and the Court should have reversed the ruling of the District Court and should have ordered the granting of petitioner's motion for a new trial on the ground that the findings, judgment, decision

and order of said District Court, filed November 22, 1928, are not justified by the evidence and are contrary to law (see R. 53, 55, 80, 83).

(8) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the ruling of the District Court denying petitioner's motion to amend its answer so as to include therein a counter-claim for damages for respondent's negligence in not properly dealing with or presenting for payment the check involved in said action, and the Circuit Court of Appeals for the Eighth Circuit erred in not vacating and annulling the judgment of the District Court and in not ordering the granting of a new trial upon said issues of negligence and damage, to the end that the damage caused to petitioner by the negligence of respondent, arising out of the same transaction, might be determined and set off against any amount which might be found to be due to respondent upon said freight bill, if the theory of the decision of the District Court be approved; that the evidence introduced upon the issues in this action conclusively showed said negligence and damages and the reservation and qualification stated by the District Court in paragraph twelve (next to last paragraph, R. 14) of its said decision, dated November 20, 1928, and filed November 22, 1928, does not adequately protect petitioner's rights to litigate said question of negligence and damages and a just decision of this cause requires more effective and adequate safeguard of the right to litigate said question of negligence and damages if the decision that said freight bill was not paid be adhered to; that a separate action for damages as allowed in the decision of said District Court and as affirmed by the decision of said Circuit Court of Appeals would not be effective to protect petitioner's rights in the premises (see R. 54, 14, 83).

SUMMARY OF THE ARGUMENT.

I.

The Check Was Delivered and Accepted in Full and Final Payment of the Freight Bill.

"Payment" implies a discharge of an indebtedness according to its terms.

Morgan Paving Co. vs. Carroll, 211 Ala. 121, 99 So. 640.

Bartholomew vs. Emerson-Brantingham Implement Co., 68 Colo. 244, 187 Pac. 538.

And is a matter determined by the intention or agreement of the parties.

Luckenbach vs. McCahan Sugar Refining Co., 248 U. S. 139, 149.

Bennett vs. Bank of Commerce and Trust Co., 220 Fed. 950 (D. C. N. D. Miss., 1914, Niles, J.).

48 *Corpus Juris*, 585-587.

Here the parties' conduct on the afternoon of June 19, 1926, clearly evidences an agreement that the matter of payment was then finally concluded.

II.

The Railroad Company Treated the Freight Bill as Paid.

Out of the sum of $375.96 paid only by this check, the railroad company refunded $4.26 by means of a draft which was duly honored. There could not lawfully be a refund of an overpayment unless overpayment was first actually consummated.

Davis vs. Mobile R. Co., 194 Fed. 374 (C. C. A.—Fifth Circ., 1912).

10 *Corpus Juris*, 454, Sec. 718.

III.

THE LONG CONTINUED PRIOR CONDUCT OF THE RAILROAD COMPANY WAS TO ACCEPT CHECKS IN FULL PAYMENT OF FREIGHT BILLS.

For more than a year and a half prior to June 19, 1926, and in scores of instances, every Fullerton freight bill at Kimball had been paid by check. Every one of these checks had been presented by the railway's agent for payment at the bank at Kimball on the same or next business day. The Fullerton Company had a right to expect that the check given on June 19 would be handled the same way.

IV.

THE SOLE CAUSE OF THE FAILURE OF THE RAILROAD COMPANY TO OBTAIN CURRENCY ON THE CHECK WAS ITS OWN NEGLIGENCE, ITS DISREGARD OF THE DUTY OF PROMPT PRESENTATION WHICH IT OWED TO THE FULLERTON COMPANY AS DRAWER THEREOF.

A party to a contract cannot recover for a loss caused by his own act, representation, or omission.

Hinckley vs. Pittsburgh Bessemer Steel Co., 121 U. S. 264.

Northrop vs. Mercantile Trust Co., 157 Fed. 497 (C. C. A. 4th Circ., 1907).

McElwee vs. Bridgeport Land Co., 54 Fed. 627 (C. C. A. 5th Circ., 1893).

Stanton vs. N. Y., etc., R. Co., 59 Conn. 272, 22 Atl. 300.

Barton vs. Gray, 57 Mich. 622, 24 N. W. 638.

13 *Corpus Juris*, 647.

This rule applies to a common carrier railroad seeking to collect freight charges.

Davis vs. Akron Feed & Milling Company, 296 Fed. 675 (C. C. A.—6th Circ. 1924).

And it applies irrespective of the fact that the carrier seeking to collect is the last carrier acting as agent of prior ones.

Davis vs. Akron Feed & Milling Company, 296 Fed. 675 (C. C. A.—6th Circ. 1924).

V.

Under the Circumstances Disclosed in the Case at Bar, It Is Settled Law That the Check Was Accepted in Unconditional Payment.

Respondent may argue that a check is conditional payment only, dependent upon whether it ultimately is honored.

See 21 *Ruling Case Law*, pages 60-62.

Manitoba Mortgage Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542, and cases cited at page 87 of 114 Minn.

But this rule only applies where prompt and proper presentation for payment has been made. Where the failure to obtain currency or its equivalent upon the check is due to the laches of the payee in not promptly and properly presenting the check to the drawee bank for payment, the check is absolute and unconditional payment; the creditor is deemed to have received the currency which, but for his wrong, he would have received.

Manitoba Mortgage & Investment Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37 (1904).

21 *Ruling Case Law*, pages 66-67, and cases cited.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542.

Tobiason vs. First State Bank of Ashby, 173 Minn. 533, 217 N. W. 934.

Braun vs. Cox, 202 Iowa 1244, 211 N. W. 891.

Campbell vs. Shark, 46 Idaho 278, 267 Pac. 458.

Illustration: *Quarles vs. Taylor & Company*, 195 N. C. 313, 142 S. E. 25:

> A creditor in a nearby town received a check drawn on the Bank of Whitakers in payment of a debt. He deposited it for collection in his own bank, which forwarded it to the Bank of Whitakers. When it arrived, the Bank of Whitakers charged it to the drawer's account and forwarded a draft for the proceeds. Before the draft arrived, the Bank of Whitakers closed its doors. *Held*, the check was paid.

Where the payee is guilty of laches in presenting a check for payment, and the drawee bank in the meantime suspends payment, the check operates as payment of the debt.

21 *Ruling Case Law*, "*Payment*," Sec. 65, page 66.

Taylor vs. Wilson, 11 Metcalf (Mass.) 44, 45 Am. Dec. 180.

Federal Land Bank vs. Barrow, 189 N. C. 303, 127 S. E. 3.

Lloyd Mortgage Co. vs. Davis, 51 N. D. 336, 199 N. W. 869, 36 A. L. R. 465, and note, 36 A. L. R. 471.

Kirkpatrick vs. Puryear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

Nuzum vs. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024.

VI.

THE CONSTITUTIONAL IMMUNITY OF SOVEREIGN STATES DOES NOT COVER A RAILROAD: EGGLESTON VS. PLOWMAN DOES NOT APPLY.

The District Court and the Circuit Court of Appeals for the Eighth Circuit placed great weight on a South Dakota case which held that where a taxpayer sent a draft drawn by a nearby bank to a county treasurer in payment of a real estate tax and the county treasurer delayed three weeks in presenting the draft for payment and it was dishonored, mandamus would not issue for issuance of a tax receipt; the county was not chargeable with the treasurer's negligence.

Eggleston vs. Plowman, 49 S. D. 609, 207 N. W. 981.

That case was in essence an attempt to sue a sovereign state. Under the Eleventh Amendment to the United States Constitution, such a suit could not be brought.

United States Constitution, Eleventh Amendment.
Railroad Company vs. Tennessee, 101 U. S. 337.
Railroad Company vs. Alabama, 101 U. S. 832.
Duhne vs. New Jersey, 251 U. S. 311.
I *Cooley, Constitutional Limitations*, 8th Ed., pages 21-24, and cases cited.

A sovereign state cannot be sued in its own courts.

25 *Ruling Case Law*, page 413.
Railroad Company vs. Tennessee, 101 U. S. 337.
Railroad Company vs. Alabama, 101 U. S. 832.
Fitts vs. McGhee, 172 U. S. 516.
Smith vs. Reeves, 178 U. S. 436.
Palmer vs. Ohio, 248 U. S. 32.
Ex Parte State of New York, 256 U. S. 490.

Hampton vs. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A. L. R. 1456, note.

Mills vs. Stewart, 76 Montana 429, 247 Pac. 332, 47 A. L. R. 424.

State vs. Field, 27 N. M. 384, 201 Pac. 1059.

Looney vs. Stryker, 31 N. M. 557, 249 Pac. 112, 50 A. L. R. 1404, note.

White Eagle Oil, etc., Co. vs. Gunderson, 48 S. D. 608, 205 N. W. 614, 43 A. L. R. 397, note.

A state is not liable for the negligent acts of its agents unless, through the legislative department, it assumes such liability.

Murdock Parlor Grate Co. vs. Commonwealth, 152 Mass. 28, 24 N. E. 854.

Mills vs. Stewart, 76 Montana 429, 247 Pac. 332, 47 A. L. R. 424.

Lewis vs. State, 96 N. Y. 71.

Clodfelter vs. State, 86 N. C. 51.

Billings vs. State, 27 Wash. 288, 67 Pac. 583.

36 *Cyc.* 881.

VII.

THE DEVICE WHICH THE RAILWAY COMPANY SEEKS TO USE TO PREVENT THE GENERAL RULES OF LAW APPLICABLE TO OTHERS FROM GOVERNING ITS OWN CONDUCT AND TO ESCAPE RESPONSIBILITY FOR THE CONSEQUENCES OF ITS OWN ACTS IS THE INTERSTATE COMMERCE COMMISSION RULING REGARDING FREIGHT CHARGES AND AN ATTEMPTED EXTENSION OF THE RULE OF LAW THAT FREIGHT BILLS CANNOT BE COMPROMISED BY DELIVERY OF SOMETHING OF UNCERTAIN VALUE. THAT RULING AND THAT RULE OF LAW DO NOT GOVERN THIS CASE.

Interstate Commerce Act, Title 49, U. S. C., Sec. 6, Par. 7.

Interstate Commerce Commission Conference Ruling No. 207, adopted September 15, 1906.

Davis vs. Akron Feed & Milling Co., 296 Fed. 675, 677-678 (C. C. A.—6th Circ. 1924).

Pennsylvania R. Co. vs. Olivit Brothers, 243 U. S. 574.

Paragraph 7 of Section 6 of the Interstate Commerce Act (49 U. S. C.), and Conference Ruling Number 207 of the Interstate Commerce Commission (adopted September 15, 1906), are directed at unfair discrimination in the collection of transportation charges. "The acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules" is precluded.

Louisville & Nashville Railway Company vs. Mottley, 219 U. S. 467.

Chicago, Indianapolis and Louisville Railway Company vs. United States, 219 U. S. 486.

New York Central & Hudson River Railroad Company vs. Gray, 239 U. S. 583.

But none of these statutory provisions or decisions precludes the payment of money for transportation charges by means of checks. They do not deal with the question whether a check is a proper mechanism to use to remit money in payment of freight charges.

The use of checks to remit money is well-nigh universal among business men.

City of El Paso vs. Two Republics Life Insurance Company, Texas Civil Appeals, 1926, 278 S. W. 231.

A check drawn on a bank and delivered to that bank in discharge of an obligation is a payment in cash, although no currency, greenbacks, gold or silver actually change hands.

Andrew vs. Hartley State Bank, 207 Iowa 407, 219 N. W. 929 (1928).

Messenger vs. Carroll Trust and Savings Bank, 193 Iowa 608, 187 N. W. 545 (1922).

Payment of cash, of money, may be made by check, and it is not necessary to have greenbacks or gold or silver change hands in order to consummate a payment of money.

Montgomery County vs. Cochran, 121 Fed. 17 (C. C. A.—Fifth Circuit, 1903).

Bennett vs. Bank of Commerce and Trust Co., 220 Fed. 950 (Dist. Ct. Miss., 1914).

Andrew vs. State Bank of Dexter, 204 Iowa 565, 215 N. W. 742 (1927).

Palmer vs. Golden, 127 N. Y. Misc. 487, 216 N. Y. S. 509.

Abeles vs. Guelick, 101 N. J. E. 180, 137 Atl. 856 (1927).

VIII.

ADOPTION OF RESPONDENT'S VIEWS WOULD ANNUL THE LAW MERCHANT AND RESULT IN GREAT INCONVENIENCE IN THE TRANSACTION OF MODERN BUSINESS.

The general body of commercial usages in matters relative to commerce constitute a part of the law of the land; this is a developing, living law of which the courts take judicial notice.

Bouvier, Law Dictionary, 3rd Ed., page 1882.

IX.

THE WORDS ON THE CHECK "COLLECTIBLE AT PAR THROUGH FEDERAL RESERVE BANK AT MINNEAPOLIS" ARE NO JUSTIFICATION FOR RESPONDENT'S FAILURE TO PROMPTLY PRESENT THE CHECK FOR PAYMENT.

Spokane Valley State Bank vs. Lutes, 133 Wash. 66, 233 Pac. 308.

Circular No. 35, June 15, 1916, Federal Reserve Bank of Minneapolis.

Circular No. 193, Jan. 15, 1920, Federal Reserve Bank of Minneapolis.

Circular No. 227, Oct. 1, 1920, Federal Reserve Bank of Minneapolis.

Circular No. 245, April 1, 1921, Federal Reserve Bank of Minneapolis.

Circular No. 358, Jan. 1, 1927, Federal Reserve Bank of Minneapolis.

X.

THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT LEAVE TO INTERPOSE IN THIS ACTION COUNTER-CLAIM FOR THE LOSS CAUSED BY RESPONDENT'S WRONGFUL ACTS.

Cases permitting counter-claim:

Chicago & North Western Railway Company vs. Lindell, 281 U. S. 814.

C. M. & St. P. Ry. Co. vs. Pioneer Grain Corp., 26 F. (2d) 90 (Dist. Ct. Minn., Judge John B. Sanborn).

Payne vs. Clarke, 271 Fed. 525 (D. C. S. D. Calif., Judge Bledsoe).

C. & N. W. Ry. Co. vs. Tecktonius Mfg. Co., 262 Fed. 71 (D. C. E. D. Wis., Judge Geiger).

Wells Fargo & Co. vs. Cunco, 241 Fed. 727 (D. C. S. D. N. Y., Judge Mayer).

Central of Georgia Ry. Co. vs. Birmingham Sand & Brick Co., 9 Ala. App. 419.

Battle vs. Atkinson, 9 Ga. App. 488.

Penn. R. Co. vs. Bellinger, 101 N. Y. Misc. Rep. 105.

N. Y. Central R. Co. vs. Federal Sugar Co., 201 N. Y. App. Div. 467.

Nashville, C. & St. L. Ry. vs. Tennessee Mill Co., 143 Tenn. 237.

Cases denying counter-claim:

Michigan Central R. Co. vs. Piowaty, 36 F. (2d) 604 (D. C. N. D. Ill., Judge Woodward).

Fullerton Lumber Co. vs. Chicago, M. St. P. & P. R. R. Co., 36 F. (2d) 180 (C. C. A.—8th Circuit, Judge Woodrough).

Pennsylvania R. Co. vs. South Carolina Produce Ass'n,

25 F. (2d) 315 (D. C. E. D. South Carolina, Judge Cochran).

Johnson-Brown Co. vs. Railroad, 239 Fed. 590 (D. C. S. D. Georgia, Judge Speer).

C. & N. W. Ry. Co. vs. Stein Co., 233 Fed. 716 (D. C. Neb., Judge Munger).

Illinois Central R. Co. vs. Hoopes, 233 Fed. 135 (D. C. S. D. Iowa, Judge Wade).

D. L. & W. R. R. Co. vs. Nuhs Co., 93 N. J. Law 309.

Adams Express Co. vs. Albright Bros., 75 Pa. Super. Ct. 410.

XI.

THE DICTATES OF SUBSTANTIAL JUSTICE AND FAIR DEALING REQUIRE A DECISION IN PETITIONER'S FAVOR.

ARGUMENT.

I.

THE CHECK WAS DELIVERED AND ACCEPTED IN FULL AND FINAL PAYMENT OF THE FREIGHT BILL.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The car of coal was placed on the siding for unloading near the Fullerton coal warehouse on the afternoon of June 17, 1926 (R. 17). On Saturday, June 19, early in the afternoon, "between two and three o'clock P. M.," according to the railway agent, Gustafson (R. 17), and "around two o'clock," according to the Fullerton agent, Mr. Yarosh (R. 37), Gustafson came over to the lumber yard office with the freight bill and its duplicate, the delivery receipt, and presented it to Yarosh for payment (R. 37), in exactly similar manner as

had been done for former freight bills for more than a year and a half previously (R. 22, 39-40; Exhibits 1 and 2, R. 57-72). Yarosh then and there paid the freight bill by drawing check number 738 of the Fullerton Lumber Company, dated June 19, 1926, on the Lumbard State Bank of Kimball, for $375.96, and immediately delivering it to Gustafson. Yarosh then deducted $375.96 from his bank balance as shown on his stub (R. 45), and Gustafson marked the freight bill "Received payment 6/19/1926, F. T. Gustafson," and delivered it to Yarosh so receipted (Exhibit A, page 56; R. 37, 17).

By this transaction, both parties agreed that the obligation on the freight bill was discharged (R. 18). Gustafson put the check in his cash drawer, treating it as a collection (R. 18). The transaction was fully completed some time prior to 3 P. M., Gustafson returning two blocks to the depot in time to take care of his duties prior to departure of the 3 P. M. westbound train (R. 26). The Lumbard State Bank was about two minutes' walk, two blocks' distance, from the lumber yard office, was open at the time the check was delivered, and did not close for the day until about an hour after the 3 P. M. westbound had left (R. 27). Gustafson never asked Yarosh for cash or currency in payment of freight charges, taking the check in final payment in the same manner as he had done scores of times before (R. 48), and no question as to the finality of the transaction arose so as to come to the attention of Yarosh until, on June 29, 1926, ten days after the check was delivered, he was for the first time notified that the check had not been paid by the bank (R. 38). He immediately went over to the depot to see Gustafson and this conversation, substantially, took place:

"A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes. And Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embarrass the bank. I told him, why didn't he say something, I could have got him the cash from the bank" (R. 38).

Gustafson was recalled, in an effort to overcome this testimony by Yarosh, but he admitted the conversation substantially as Yarosh related it, except that he tried to deny that embarrassment of the bank was given as one reason for sending the check down to Chicago, 660 miles away from Kimball and from the bank on which it was drawn (R. 46-47). The testimony of John Dickie, assistant treasurer of the Railway Company shows, however, that the matter was left much to the discretion of the local agent (R. 32-33; Exhibit 4, page 73), depending upon whether he felt any question about the bank, and this testimony tends to substantiate Yarosh, whose testimony throughout is full, frank and obviously candid and sincere.

No question is, or can be, made in this case as to the authority of the railway agent at Kimball, Mr. Gustafson, to receive the check in payment and receipt the freight bill (see R. 48, 32; Exhibit 4, 73).

"Payment" implies a discharge or extinguishment of the indebtedness or obligation according to its terms (*Morgan Paving Co. vs. Carroll*, 211 Ala. 121, 99 So. 640; *Bartholomew vs. Emerson-Brantingham Implement Co.*, 68 Colo. 244, 187 Pac. 538), and is a matter determined by the intention or agreement of the parties (*Luckenbach vs. McCahan Sugar Refining Co.*, 248 U. S. 139; *Bennett vs. Bank of Commerce and Trust Co.*, 220 Fed. 950; 48 *Corpus Juris* 585-587). In the light of these principles there can be no doubt that the

freight bill in the case at bar was paid. Both parties did in fact intend that the obligation was extinguished simultaneously with delivery and receipt of the check; both parties intended, agreed and understood that the check was a proper and sufficient means to accomplish such extinguishment; both parties intended, agreed and understood that the check stood for and represented, not something of uncertain value like a damage claim, or advertising, or services, but exactly $375.96 in United States currency.

II.

The Railroad Company Treated the Freight Bill as Paid.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

When the check was delivered, the railway's agent, Gustafson, regarded the freight bill as paid (R. 17-18).

In addition, several months later the Fullerton Lumber Company, also continuing to regard the freight bill as paid, filed a claim with the Railway Company demanding the return of $6.51 out of the sum of $375.96 as being an overpayment, due to improper calculation of weight of the coal. After some controversy, the Railway Company admitted the correctness of the position taken by the Fullerton Company, with some modification, and paid back $4.26 of the amount theretofore paid, by sending its draft for that amount to the Fullerton Company (R. 35-36).

Unless the freight bill was theretofore paid, and so regarded by both parties, this conduct on the part of the Railway Company is unintelligible. The shipper had no basis to demand repayment of the overcharge unless the bill had been actually paid, and a complaint in an action for its recovery which failed to allege the prior payment would have been de-

murrable (*Davis vs. Mobile R. Co.*, 194 Fed. 374; 10 *Corpus Juris*, page 454, Sec. 718, and cases cited). The Railway Company could not lawfully have made this repayment of the overcharge, unless the freight bill was paid.

Both under the original agreement at the time the check was delivered and the freight bill receipted, and under the subsequent conduct of the parties relative to this claim of overcharge, the freight bill was paid. The conduct of the Railway Company ratified the acts of its agent Gustafson in accepting the check in full and final payment of the freight bill.

III.

The Long Continued Prior Conduct of the Railroad Company Was to Accept Checks in Full Payment of Freight Bills.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

Mr. Yarosh had been the agent in charge of the Fullerton Lumber Company's yard at Kimball ever since the yard began to be operated by the Fullerton Company, in June of 1922 (R. 37). He had always paid the freight bills by check, such checks had always been accepted by the Railway Company in full and final payment and no question regarding such payment had ever been raised by the Railway Company prior to the case at bar (R. 39-40).

The check in controversy is No. 738 of the Fullerton Company, for $375.96, and it was dated and delivered on June 19, 1926 (Exhibit C, page 56).

Check No. 737, the next preceding one, is also in evidence (Exhibit 1, page 57). This check, for $502.70, was dated and delivered on June 15, 1926, four days earlier, and it likewise was accepted in payment of a freight bill (R. 23-24, 39).

It covered the freight on two cars of coal (R. 39). That check was presented for payment to the Lumbard State Bank of Kimball the same day on which it was drawn and delivered, and it was duly paid on that same day (Exhibit 1, page 57).

Thirty-six prior checks, beginning with number 548, for $147.15, dated and delivered June 11, 1925, to and including number 724, for $2.38, all drawn on the Lumbard State Bank of Kimball by Fullerton Lumber Company and made payable to the Railway Company, and delivered to and accepted by the railway in payment of freight charges, are in evidence (Exhibit 2, pages 57-72). These checks cover all of the transactions between the Railway Company and the Fullerton Company for more than a year prior to June 19, 1926. In not one of these transactions was any question ever raised by the Railway Company as to the manner of payment; ever since 1922 this was the manner and medium by which freight charges were paid, in these transactions between these two parties, and never at any time did the Railway Company raise any question as to the propriety of this method of payment (R. 39-40). It is the common and the usual manner of payment under modern business conditions.

The 37 prior checks thus introduced in evidence in this case are well worth careful study. The Court will find, upon inspection of the originals, that every one of these checks was presented by Gustafson for payment at the bank, either on the same day as its date or, at most, on the next succeeding business day, as the law requires (R. 25). During all of the time during which the parties involved in this controversy had business transactions between them at Kimball, no check of the Fullerton Lumber Company had been sent away down to Chicago by Gustafson, prior to June 19, 1926 (Gustafson, R. 24). In all previous cases, Gustafson

presented the checks for payment to the bank at Kimball within twenty-four hours (R. 25). This conduct shows, as we think conclusively, that Gustafson and the Railway Company knew fully their obligation and duty to make prompt presentation for payment of these checks accepted by them in payment of freight charges. So long as there was such prompt presentation, no difficulty over this method of payment ever arose. The Fullerton Company had a right to expect that the check given on June 19, 1926, would be handled in the same manner. As these checks, stamped duly paid by the Lumbard State Bank, came back to Mr. Yarosh with each monthly statement, they showed on their faces that they had been properly and promptly presented to the bank on which they were drawn for payment and were duly honored and paid. Yarosh first learned that the check in controversy had not been honored on June 29, 1926, ten days after its delivery (R. 38). Prior to that date, for a period running back to 1922, he never had had any notice that Gustafson was sending these checks down to Chicago. In fact, Gustafson never did send them to Chicago, until he so disposed of the check here in controversy (R. 24).

IV.

THE SOLE CAUSE OF THE FAILURE OF THE RAILROAD COMPANY TO OBTAIN CURRENCY ON THE CHECK WAS ITS OWN NEGLIGENCE, ITS DISREGARD OF THE DUTY OF PROMPT PRESENTATION, WHICH IT OWED TO THE FULLERTON COMPANY AS DRAWER THEREOF.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

No question that the check represented $375.96 in United States currency could ever have arisen but for one thing: the

wrongful act, the plain neglect, of the Railway Company in failing and refusing to carry out its undertaking to go to the Lumbard bank and obtain the greenbacks on the check, not later than 4 P. M. of Monday, June 21, 1926, and, instead, in sending the check 660 miles down to Chicago, nearly twenty-four hours' journey by train, and around Robin Hood's barn for more than a week, thus placing upon the drawer, the Fullerton Lumber Company, a risk which it never assumed and never intended to assume and against which risk the Railway Company was bound to protect its shipper, the drawer of the check, by prompt presentation as the law requires. Had the Railway Company continued its failure to present the check for no longer a period than the forenoon of the sixth day after its delivery, the consequences of the risk to which its conduct subjected the Fullerton Company could have been escaped, but when such neglect was continued beyond that time it was too much, and disaster came.

Now, in the case at bar, the Railway Company, in the position of the aggressor, comes into this Court asking for court help to shift onto the Fullerton Company the consequences solely due to such neglect. The respondent in effect says: "Even though our own wrongful act and neglect is the sole cause of our failure to obtain currency on the check, nevertheless we will make the Fullerton Company stand the loss; we will make it pay the damage which we have caused. We will make it pay the loss and thus escape the ordinary and natural consequences of what we ourselves have done and failed to do."

Such an attitude does violence to the dictates of commonsense and fairness and is directly antagonistic to well-settled principles of common law governing performance of contracts.

"A party to a contract cannot take advantage of his own act or omission to escape liability thereon, hence where he causes or sanctions a breach, he cannot recover damages for non-performance or interpose the breach as a defense to an action on the contract. Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him."

13 *Corpus Juris* 647.

See the following authorities in support of this rule:

Hinckley vs. Pittsburgh Bessemer Steel Co., 121 U. S. 264.

Northrop vs. Mercantile Trust, etc., Co., 157 Fed. 497.

McElwee vs. Bridgeport Land, etc., Co., 54 Fed. 627.

Stanton vs. N. Y., etc., R. Co., 59 Conn. 272, 22 Atl. 300.

Barton vs. Gray, 57 Mich. 622, 24 N. W. 638.

The Fullerton Company had ample funds on deposit at the Lumbard State Bank to cover its check (R. 38), and Yarosh could have himself gone to the bank and obtained bank notes, gold or silver certificates, legal tender notes or greenbacks, or gold or silver, whatever Gustafson required, upon his check. But Gustafson was willing to and did accept the check and himself undertake to get the currency upon it. As Gustafson wrote under date of July 12, 1926, in his letter addressed to the Fullerton Lumber Company at Minneapolis:

"In regard to the returned 'unpaid' check—$375.96, needless to say that I am very sorry this happened and of course had we known what was going to happen we could have probably avoided the trouble. It surely makes a bad mess of it" (Ex. 3, page 72; R. 27).

There is no warrant for any intimation that the check, if it had been presented to the Lumbard State Bank, at any time up to the time the bank closed at noon of June 25, 1926, would not have been promptly honored and paid.

Under cross examination, the Fullerton agent, Mr. Yarosh, testified that he cashed several checks at the Lumbard State Bank after June 19th up to June 25, 1926. These included one check for $50 cashed on June 23rd, one for $20.55 cashed June 24th, and possibly another one for $300 on June 24th, although he was not sure that a draft obtained for this last one did get through (R. 41-42). Mr. Yarosh made a deposit of $286.88 on June 23rd, dealt at all times with the Lumbard bank as a going concern, and had no knowledge that the bank was likely to close until it in fact did close (R. 42, 45). At the time the check was given and at all times up to the moment when the bank closed, Yarosh for the Fullerton Company had on deposit more than sufficient funds to pay the check involved in the case at bar and all other outstanding checks (R. 38).

As soon as he learned that the check had not been promptly presented and had not been honored, which was ten days after its delivery, and on June 29, 1926, Yarosh immediately took the matter up with Gustafson. He testified as follows:

"Q. When did you first learn that that check had not been paid by the bank

A. On June 29.

Q. What did you do when you received that notice?

* * * * * * * * * *

A. I went right down to the depot to see Mr. Gustafson.

* * * * * * * * * *

A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes, and Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embarrass the bank. I told him why didn't he say something, I could have got him the cash from the bank" (Yarosh, R. 38).

Again, Yarosh testified with respect to who was to go and get the currency as follows:

"Q. On the 19th day of June, 1926, did Mr. Gustafson say anything to you about currency in payment of the freight bill? Did he ask for currency?

A. No, sir.

Q. Did he at any previous time?

A. No, sir.

Q. Nothing was ever said by him about currency?

A. No, sir.

Q. He never demanded cash, or currency, from you in payment of freight bills?

A. No, sir" (Yarosh, R. 45).

Under such circumstances, we know of no authority which supports the efforts of the Railway Company to escape the ordinary consequences of its own acts. It tries to say: "The law requires you to pay all freight bills in currency; you did not get currency to us; maybe we did agree to get it ourselves upon your order, by prompt presentation of your check, and wholly failed to do what we agreed to do; but that makes no difference; there is something so holy about a freight bill that we can disregard anything we said and did, can override ordinary rights; we are not estopped by anything to make you pay twice." Not only is there no authority which supports such an extreme disregard of ordi-

nary rules of right conduct and of individual rights, but there is at least one well decided case in the Federal Courts directly to the contrary.

In *Davis vs. Akron Feed & Milling Company*, 296 Fed. 675, Circuit Court of Appeals, Sixth Circuit, the agent of the railroad company at Akron erroneously told the consignee there that the freight charges on a shipment from Kansas had been paid as far as Chicago. The consignee settled with the consignor on that basis, and allowed him credit for these freight charges. In fact the charges for freight for this part of the haul had not been paid. The consignor had become insolvent so that no collection could be had from him. The Erie, the last carrier, then sued the consignee for the unpaid freight charges, as agent of prior carriers, and the defendant, therein set up the defense that it had relied upon the statement made by the Erie's agent, and had a right to rely upon it. The carrier asserted that this was no defense, because under the Hepburn Act it was required to collect all freight charges and do it in money. The court held in favor of the consignee, that the carrier was estopped from demanding further payment of freight from the defendant. In holding that these common law rules applied, the court said:

> "If the matter were one wholly between the carrier and the consignee, there would be no question that the carrier's representation would estop it from demanding further payment of freight. While the statute requiring every shipper and consignee of freight to pay the full published scheduled rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected."

And the court in this case went on to say:

> "In this case no presumption obtains that the consignee knew that the freight upon this consignment from Kansas City to Chicago had not ben paid. This was not a matter of public knowledge. While the question of legal liability is not free from doubt, *the equities are clearly with the consignee, and we are not impressed that the public interest demands such construction of the law as would make the consignee suffer a loss due to the fault, negligence and misrepresentations of the carrier.*"
>
> (Per *Curiam, Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675 (C. C. A., 6th Cir., 1924).)

When Gustafson, for the railroad company, accepted the check in payment of the freight bill, it was no longer in the power of the Fullerton Lumber Company to obtain the currency upon that check, as called for by the check, and it was thereafter in the power of the railroad company to obtain the currency by means of it. The Fullerton Company could not thereafter take the check to the bank, because it no longer possessed the check, it was, after delivery, owned by and in the possession and control of the railroad company.

It would, admittedly, have taken Mr. Gustafson at the most five or ten minutes to have gone up to the bank and to have exchanged the check for greenbacks (R. 27). It was in his sole power to do so. It was not in the power of the Fullerton Company's agent to have done so after the check was delivered.

No justification has been shown for the failure and refusal of the railroad company to treat this check and deal with it as it had dealt with every other check of the Fullerton Company of which we have any knowledge, apart from

an attempt, made for the first time in this litigation in respondent's brief in the Circuit Court of Appeals, to use the words printed on the check, "Collectible at Par Through Federal Reserve Bank at Minneapolis," as some sort of a justification. These printed words were not mentioned at the trial and no attempt was there made by respondent to show their meaning or to refer to them in any way as a justification. We shall deal with them hereafter.

Respondent's position but emphasizes the seriousness of its wrong when reference is made to Dickie's testimony, regarding his investigations into the condition of the bank (R. 32-33). Dickie admits that he had investigated the bank prior to June 16, 1926 (R. 73, Exhibit 4; 33), and thought it was shaky; he admits that he notified Gustafson on June 16th to send the checks clear in to Chicago; but one will look in vain for the slightest intimation from Dickie to the Fullerton Company stating that there was to be a change in his method of dealing with checks. Instead of being some excuse for sending the check around Robin Hood's barn for nine days, the information which Dickie claims he received about the Lumbard bank prior to June 16th was all the more reason why his agent, Gustafson, should have gone to the bank and have obtained the currency in the shortest possible time after receipt of the check. He knew that it greatly increased the risk of loss to the Fullerton Company to send the check six hundred sixty miles away before presenting it to the home bank; he knew that, if the bank was shaky, the danger to the Fullerton Company was thereby greatly increased. And yet, when Dickie was asked why his instructions to his agents were not to immediately obtain currency and ship that, instead of to send the check clear in to Chicago, the only answer Dickie could make was that he thought it was a little risky to his company to ship

the currency, instead of the check, through his own express company (R. 33).

The unsoundness of this argument is all the more apparent, when it leads respondent to contend that it was incumbent upon the Fullerton Company to deliver "legal tender," greenbacks, or gold and silver, in specie to the railroad. Had that been done, say counsel for the railroad, in their argument below, everything would have been all right. But in that case the railroad company would have been compelled to ship the currency or the gold and silver by its own express company, in spite of the alleged risk of such shipment (R. 33), and the very thing for which the railroad company contends demonstrates the clear fallacy of this testimony, by Dickie, in endeavoring thereby to make out some excuse for sending a check drawn on a bank in the same town on a nine days' journey abroad while, according to his own statements, the bank on which it was drawn was becoming shakier and shakier, and the railroad company and its agents had full knowledge that it was shaky.

Ordinarily (*Manitoba Mortgage & Investment Company vs. Weiss*, 18 S. D. 459, 101 N. W. 37), the drawee of a check has until the following day after its receipt to present the check for payment, when drawn on a bank in the same town or city where the check is given and received. This is the well-nigh universal rule. But, in the case at bar, according to respondent's own testimony, the railroad company had reason to believe that the Lumbard State Bank was in shaky condition. The Fullerton Company had no such knowledge, and dealt with the bank on the basis of full confidence, making deposits and maintaining an account therein, right up to the moment of closing (R. 38, 40-42, 45). The railroad company must have clearly known that the Fullerton Company had full confidence in the bank and that it dealt on that

basis in delivering the check.

In such a situation, it may well be doubted that, when the railroad company took and accepted the check in payment of the freight bill, it had any right to hold it even twenty-four hours before presenting it. Under these circumstances, plainly the railroad company should have presented the check for payment as speedily as possible, that same afternoon. There was plenty of time for Gustafson to have gone up to the bank after the 3:00 P. M. westbound passenger train had come and gone. Yet he did not do it, did not take this simple, easy, five-minute walk which would have ended the grave risk which he knew or had reason to believe impended over his good customer and friend, the Fullerton Lumber Company, and of which he and his employer knew and had reason to believe the Fullerton Lumber Company was not aware. The fact is that the railroad company did not want greenbacks or gold or silver that day and does not want them now, as its argument shows. What it desired then and still desires is to continue its practice of accepting checks in payment of freight bills, so as to have the advantage of the convenience and safety of this modern method of remitting money or cash, but with a ruling of this Honorable Court engrafting a new exception to the universal rule requiring prompt presentation for payment so as to relieve the railroad company entirely from any responsibility or risk of loss in its dealing with a check, even though, as in the case at bar, complete loss was caused solely by the acts of the railroad itself.

In fact, no substantial excuse or justification for the railroad company's conduct in the handling of this check can be found. The rule of law requiring checks drawn on a bank in the same town to be promptly presented for payment on the same or next succeeding business day following delivery

is admitted and its applicability is plain. The burden of respondent's argument is one of confession and avoidance: that there should now be added an exception to the rule where a railroad company is involved. There is no solid authority which substantially supports or requires the engrafting of such an exception onto the admitted general rule.

What Dickie should have done, of course, if the railroad company really is sincere in its position that only greenbacks, gold or silver can be taken in payment of a freight bill, was something very different from what he did do. Instead of telling Gustafson to place greater risks upon shippers by sending their checks in to Chicago, he should have told his agent to refuse to take any more checks, or to demand currency, or to notify the Fullerton Company that thereafter checks would be handled differently from the previous method, would now be sent down to Chicago at the risk of drawers thereof. *He did none of these things. There was not so much as the whisper of an intimation to the Fullerton man at Kimball of any of Dickie's fears.* And it was entirely natural that after he learned of what had happened Mr. Yarosh, who had had no suggestion of Dickie's new fears arising on June 16th, should feel that he had been very much misled by these tactics. As he testified:

> "I asked Gustafson what he did that for and he told me he didn't want to embarrass the bank. I told him, why didn't he say something, I could have got him the cash from the bank" (R. 38).

Admittedly, the Fullerton Company was never notified of Dickie's instructions (R. 34). Respondent argues that Dickie "didn't have sufficient information to warrant his advising shippers that we didn't consider the Lumbard State Bank as being in good shape" (R. 35), but this is no

valid excuse and we fail to understand how it has anything to do with the case. It was not necessary for Dickie to notify the Fullerton Company anything about the Lumbard State Bank; what the Fullerton Company was entitled to notice about was about Dickie; that Dickie was now going to require Fullerton checks to go to Chicago, at peril of what would happen; that Dickie was now going to take the position that nothing but "legal tender" was acceptable by his company in payment of freight bills, and henceforth all checks were at drawer's risk and they were not going to present them on the same or next succeeding business day. Some such information would have been the fair thing to have given the Fullerton man, would have put him on his guard. It was information about Dickie that was needed; it had nothing to do with the Lumbard State Bank of Kimball and the remarks of Mr. Dickie at page 35 of the record have no relevancy to any of the material issues in this case. Neither does it have any bearing that the home office of Fullerton Lumber Company is at Minneapolis. This entire transaction took place at Kimball, and every element in it took place as though the Kimball yard were the only one in existence and its office the home office.

So, then, what we have here are statements by Dickie and his agent Gustafson that, at a time when they had information that the Lumbard State Bank was becoming shaky, they deliberately increased by ten fold the risks of loss upon the Fullerton Company, by sending the check on a nine days' journey into Illinois without so much as giving the Fullerton Company an intimation of what they intended to do, or of the reasons for it, or of the fact that this was a radical departure from all prior past procedure. And now they say that they and the railroad company are under no responsibility for all of this, because the Interstate Commerce Com-

mission rules that there shall be no discrimination in freight rates and that freight bills shall be paid in money, not in property of uncertain value.

It seems to us that this ruling of the Interstate Commerce Commission is not a shield but a sword; that it is not a cloak to relieve such conduct of normal responsibility or to engraft some strange new exception upon the law, but is a weapon to protect the public and enforce a different class of responbility: responsibility for favoritism and discrimination. It cannot be used to insulate the railroad company from the normal effect of its acts in the case at bar.

In the case at bar the whole matter was out of the Fullerton Company's hands when Gustafson for the railroad company took the check and undertook to go and get the currency which it called for. The Fullerton Company had no knowledge and no means of knowing what the railroad company did with the check. Yarosh was surprised and dumfounded when he learned for the first time, on June 29th, that the check had not been promptly presented for payment (R. 38). Under such circumstances it is plain that the equities are with the consignee, and that to hold, as respondent urges this Court to hold and as was decided in the courts below, "would make the consignee suffer a loss due to the fault, negligence and misrepresentations of the carrier," directly contrary to the decision in *Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675 (C. C. A., 6th Cir. 1924).

V.

UNDER THE CIRCUMSTANCES DISCLOSED IN THE CASE AT BAR, IT IS SETTLED LAW THAT THE CHECK WAS ACCEPTED IN UNCONDITIONAL PAYMENT.

This involves discussion of assignments of error Numbers 1 to 7, inclusive.

We are aware that respondent may argue that when a check is given and received in payment, it is conditional payment only, depending upon whether the check is honored and paid by the bank upon which it is drawn. (See 21 *Ruling Case Law*, pages 60-62; *Manitoba Mortgage Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37; *McFadden vs. Follrath*, 114 Minn. 85, 130 N. W. 542, and cases cited at page 87 of 114 Minn.)

But this rule only applies in cases where there has been no failure on the part of the creditor to properly carry out his undertaking to make prompt presentation for payment to the bank upon which the check is drawn. Where the failure to obtain currency or its equivalent upon the check is due solely to the laches of the payee in not presenting the check to the bank, in not doing that which he undertakes to do when he takes the check, and which the law plainly requires him to do, we believe that the law is everywhere settled that the check is in such a case absolute and unconditional payment, and the creditor is deemed by the law to have received the currency itself.

Manitoba Mortgage & Investment Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37 (1904).

21 *Ruling Case Law*, pages 66-67 and cases cited.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542.

Tobiason vs. First State Bank of Ashby, 173 Minn. 533, 217 N. W. 934.

Braun vs. Cox, 202 Iowa 1244, 211 N. W. 891 (1927).
Campbell vs. Shark (Idaho, 1928), 267 Pac. 458.

In *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, the Supreme Court of South Dakota said:

> "At common law the drawee of the check has until the following day after its receipt to present it for payment as between himself and the drawer, when drawn on a bank in the same town or city where the check is given and received. * * * The drawees of a check, in the absence of an express agreement, that the same should be received as payment, may still recover the amount therein specified on the drawers in case the check is duly presented and dishonored * * * but, whenever the failure to collect the check results from the negligence of the drawees, the acceptance of the check constitutes payment * * *. Acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc. And if the party from whom it is received sustains loss by want of such diligence it will be held to operate as actual payment."

Per *Corson*, J., *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37.

In *Tobiason vs. First State Bank of Ashby*, 173 Minn. 533, 217 N. W. 934, plaintiff gave defendant a check in payment of notes. Instead of getting the cash on this check, defendant surrendered it for a draft and this draft was never paid. It was held that plaintiff had paid the notes. Chief Justice Wilson said:

> "The money was there to pay it. * * * To the extent that it was acting for him, it had no right to take anything but money. * * * The check was a condi-

tional payment. * * * The payment would have become absolute had it demanded the money."

Per *Wilson*, C. J., *Tobiason vs. First State Bank of Ashby*, 173 Minn. 533, 217 N. W. 934, 935.

McFadden vs. Follrath, 114 Minn. 85, 130 N. W. 542, contains a succinct statement of the governing principles, together with valuable citations in support of the rule. Justice Simpson for the court said:

"While payment by check usually becomes absolute payment of the debt through payment of the check, it may become so by the certification of the check by the bank for the payee, or through the laches of the payee in not presenting the check to the bank."

Per *Simpson*, J., *McFadden vs. Follrath*, 114 Minn. 85, 130 N. W. 542.

In *Braun vs. Cox*, 202 Iowa 1244, 211 N. W. 891, decided in 1927, the Supreme Court of Iowa said, regarding a check given in payment of an obligation:

"If, as Kearney testified, they received it only conditionally as payment, they were bound to use due diligence in presenting it, and if, by reason of want of diligence on their part as plaintiff's agents, the defendants or the Old Colony Company would sustain loss, the check which the Old Colony Company drew on the United States Bank would operate as actual payment. 30 *Cyc.* 1209. The bank and Kearney, having undertaken the collection, owed a duty to plaintiff (even though acting without compensation) to use diligence to make the collection. See 7 *C. J.* 610, *et seq.*; *Serry vs. Knepper*, 101 Iowa 372, 70 N. W. 601."

Braun vs. Cox, 202 Iowa 1244, 211 N. W. 891, 893.

The rule is not that the drawer of the check is entitled to set-off damages suffered by reason of the payee's negligence in presentment as against a claim for the full amount due on the original cause of action. The rule is that, by failing to use due diligence in collecting the money called for by the check, the check itself becomes absolute payment at least to the extent in money of the loss caused to the drawer.

In *Campbell vs. Shark*, 46 Idaho 278, 267 Pac. 458, the Supreme Court of Idaho stated the rule as follows, after holding that five days after delivery was too long a time to wait before presentment, in a case where the check was delivered and accepted in the same locality in which the drawee bank was located:

> "This suit is upon the original obligation. Defendant's acceptance of the check did not in the first instance constitute payment, it not being shown that there was any agreement that it be taken as an absolute payment. 30 *Cyc.* 1208. His acceptance of the check implied an undertaking to use due diligence in presenting it for payment and giving notice of dishonor, and if the appellant sustained loss by want of such diligence, it would be held to operate as payment of the original indebtedness, at least to the extent of appellant's loss."
>
> Per *Ensign, J., Campbell vs. Shark*, 46 Idaho 278, 267 Pac. 459, 460.

The reasons for these rules are self-evident. A check is an order on a bank to pay cash, money, out of one's deposit of cash or money therein (*Campbell vs. Shark*, 46 Idaho 278, 267 Pac. 459). Where one has the necessity of paying money or cash to satisfy a debt, and gives to his creditor such order for the obtaining of such cash or money, and his creditor accepts the order and undertakes to go and get the cash, he

properly and reasonably must carry out his undertaking diligently. If he fails to act reasonably and diligently and thus is unsuccessful in obtaining the cash which the order calls for, it is only because of his own supervening negligence and through no act of the debtor's that the cash is not delivered. It is, therefore, proper that the order operate as absolute payment, as it would have operated had the creditor carried out his part of the transaction, for it was a part of the debtor's method of delivering the cash and would have delivered the cash but for the wrongful supervening act of the creditor.

An illustration of this principle is the case of *Quarles vs. Taylor & Company*, 195 N. C. 313, 142 S. E. 25. In that case defendants, doing business at Whitakers, North Carolina, drew their check on the Bank of Whitakers, it came to plaintiff at Littleton and was deposited to his credit at the latter place. The Littleton bank forwarded the check for collection. It arrived at the Bank of Whitakers, and this bank charged it on its books to defendants' account and sent its draft to the collecting bank. Before this draft arrived, the Bank of Whitakers closed its doors. It was held that the check was paid and the plaintiff could not recover from defendants. It will be noted that no cash changed hands and none was sent to plaintiff. But plaintiff by his own act in using the method of collecting which he did use, caused the situation, and therefore the debt to him was deemed to have been paid in money or legal tender, although none in fact changed hands.

An excellent statement of the rule, covering practically the situation which we have in the case at bar, is as follows:

> "If a creditor receiving a check is guilty of laches in presenting it, or in giving notice of non-payment, after presentment, and the bank in the meantime suspends

payment, he thereby makes it his own, and it operates as payment of his debt; the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them."

21 *Ruling Case Law*, "Payment," Sec. 65, page 66.

See also the following authorities:

Taylor vs. Wilson, 11 Metcalf (Mass.) 44, 45 Am. Dec. 180.

Federal Land Bank vs. Barrow, 189 N. C. 303, 127 S. E. 3.

Lloyd Mortgage Co. vs. Davis, 51 N. D. 336, 199 N. W. 869, 36 A. L. R. 465, and note, 36 A. L. R. 471.

Kirkpatrick vs. Purgear, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785.

Nuzum vs. Sheppard, 87 W. Va. 243, 104 S. E. 587, 11 A. L. R. 1024.

We deem these principles substantially conclusive of the case at bar. They are well settled rules, not only of the common law, but under the Negotiable Instruments Law and under the most recent decisions and under the most recent practices of the custom of merchants, which is the source of our law applicable to checks. No serious attempt was made at the trial or in the court below on the part of the respondent to deny the correctness of these statements of the law or their applicability to the facts as disclosed in the case at bar. If the respondent in this case, instead of being the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, were an individual doing business as such in South Dakota, there would be no room for argument in this case. *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, above cited and discussed, would plainly govern the case and would end, in favor of the petitioner herein, this

attempt to place the loss upon the petitioner notwithstanding the practically admitted and uncontested wrongful handling of the check by the respondent, its laches and neglect in entirely failing to present it for payment as the law requires.

But the argument of the railroad company seems to be that it is above and beyond the ordinary rules of law which would govern the conduct of individuals. What it attempts to say is that regulations of statute law which, plainly and on their face, were not intended to give the railroad company any such high and privileged character, but which were intended to prevent discrimination on behalf of favored individuals, place it above and beyond the rules of law which would plainly govern the conduct of an individual in presenting a check drawn upon a bank in the same town, and allow the railroad company to escape the ordinary consequences of its own wrongful acts in dealing with such check. The extreme risk and the wholly uncontemplated hardship which such an argument places upon the petitioner as drawer of the check is plainly apparent, the consequence of which is an assertion by the railroad company that it can, with immunity, do anything it pleases in the handling of such checks, keep the checks three months if it so desires, or put a tremendous risk of loss upon the drawer of the check, in fact act, if it wishes, wholly above and beyond the law irrespective of the heavy loss which it, by its own unauthorized acts, inflicts upon the petitioner.

There is no authority anywhere apart from the decisions below, as we believe, which gives any warrant to that position of the railroad company or even color of plausibility to so extraordinary a doctrine, and unless and until the railroad is able to produce an authority which squarely and in terms authorizes or warrants and requires such an

extraordinary holding, we submit that the decision in this case should be against the attempt of the carrier to place the burden of the loss upon the shipper, the petitioner, Fullerton Lumber Company. This is a case where the authorities cited by the respondent below do not apply; those authorities do not govern the case where the sole cause of the failure of the respondent to have greenbacks, silver, gold or whatever it wanted in its hands, is its own laches and neglect in plainly violating the well settled rules of law applicable to all persons, irrespective of who they are, in dealing with a check drawn on a bank in the same town in which it is delivered.

VI.

THE CONSTITUTIONAL IMMUNITY OF SOVEREIGN STATES DOES NOT COVER A RAILROAD: EGGLESTON VS. PLOWMAN DOES NOT APPLY.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The controversy involved in the case at bar arose in South Dakota. The District Court and the Circuit Court of Appeals, in arriving at their decisions, placed great weight on the South Dakota case of *Eggleston vs. Plowman*, 49 S. D. 609, 207 N. W. 981, which held that where a taxpayer sent a draft drawn by a nearby bank to a county treasurer in payment of a real estate tax and the county treasurer delayed three weeks in presenting the draft for payment and it was dishonored, the negligence of the treasurer was not binding upon the county and the taxpayer must pay over again.

Without analysis both lower courts have assimilated a railroad company collecting freight charges to a sovereign state engaged in collecting taxes through its subordinate municipalities. The unsoundness of the analogy will be ap-

parent upon consideration of certain fundamental differences. No doubt the railroad company would like to enjoy the immunities from liability enjoyed by sovereign states, would like to have the novel doctrine now proclaimed that *respondeat superior* does not apply to a carrier when it is engaged in collecting freight charges.

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Under this Amendment, a state is not subject to be sued in the courts of the United States by citizens of another state, or by citizens or subjects of any foreign state (*Railroad Company vs. Tennessee*, 101 U. S. 377; *Railroad Company vs. Alabama*, 101 U. S. 832; *Duhne vs. New Jersey*, 251 U. S. 311; 1 *Cooley, Constitutional Limitations*, 8th Ed., pages 21-24 and cases cited).

It is also well settled that a state cannot be sued in its own courts, unless it has expressly consented to the suit. The rule does not rest upon express constitutional provision but upon reasons of public policy. As stated in 25 *Ruling Case Law*, page 413:

> "The doctrine rests upon reasons of public policy—the convenience and danger which would follow from any different rule. It is obvious that the public service would be burdened, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently con-

trolled in the use and disposition of the means required for the proper administration of the government."

See also the following:

Fitts vs. McGhee, 172 U. S. 516.

Smith vs. Reeves, 178 U. S. 436.

Palmer vs. Ohio, 248 U. S. 32.

Ex Parte State of New York, 256 U. S. 490.

Hampton vs. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A. L. R. 1456, note.

Mills vs. Stewart, 76 Montana 429, 247 Pac. 332, 47 A. L. R. 424.

State vs. Field, 27 N. M. 384, 201 Pac. 1059.

Looney vs. Stryker, 31 N. M. 557, 249 Pac. 112, 50 A. L. R. 1404, note.

White Eagle Oil, etc., Co. vs. Gunderson, 48 S. D. 608, 205 N. W. 614, 43 A. L. R. 397, note.

It is settled law that a state is not liable for the negligent acts of its agents unless, through the legislative department, it assumes such liability (*Mills vs. Stewart*, 76 Mont. 429, 247 Pac. 332, 47 A. L. R. 424; *Lewis vs. State*, 96 N. Y. 71; *Murdock Parlor Grate Co. vs. Com.*, 152 Mass. 28, 24 N. E. 854; *Clodfelter vs. State*, 86 N. C. 51; *Billings vs. State*, 27 Wash. 288, 67 Pac. 583; 36 *Cyc.* 881).

In this situation as to the law, the plaintiff in *Eggleston vs. Plowman*, 49 S. D. 609, 207 N. W. 981, decided in 1926, brought a mandamus action to compel defendant Plowman, in his official capacity as county treasurer, to issue and deliver to plaintiff tax receipts showing that plaintiff had paid the taxes. Eggleston, on March 29, 1924, had transmitted to defendant as county treasurer a draft drawn by an Iroquois, S. D., bank, on a St. Paul, Minnesota, bank, and payable to the order of Plowman for the correct amount of

the taxes due April 1, 1924. Defendant county treasurer held the draft for more than three weeks before presenting it for payment, and on the twenty-third day after he received the draft the Iroquois bank failed and the draft was dishonored. Defendant Plowman refused to issue the tax receipt and mandamus action was brought, predicated upon the rule of *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, that where the drawee is negligent in presenting the check or draft, by reason of which negligence it fails to be honored, the draft will be held to be absolute and not conditional payment. The Supreme Court of South Dakota held that this rule, well established as between individuals, did not apply to a county treasurer acting in his official capacity as a state tax collector, where the suit was not against him individually but was against him in his official capacity to compel him to do an offical act. The Court said:

> "It must be borne in mind that this is not a proceeding by plaintiff against defendant as an individual to recover damages sustained by plaintiff because of unreasonable delay in presentment of the draft. • • • This proceeding is by the property owner himself against the defendant in his official capacity as a county officer seeking to compel the performance of an official duty, namely, the issuance of a tax receipt • • •" (49 S. D. 609, 611).

This, then, was the situation: The suit in the Eggleston case was a suit against the defendant in his representative capacity as an officer of the State, and such a suit is in substance a suit against the State and cannot be brought (see *Fitts vs. McGhee*, 172 U. S. 516, 526; *Smith vs. Reeves*, 178 U. S. 436; *State vs. Field*, 27 N. M. 384, 201 Pac. 1059, where the

action was mandamus to compel issuance of a deed). It was an attempt to deprive the State of its tax by placing upon the State liability for the negligence of its officer in delaying three weeks or more before presenting the draft for payment. It is settled law, as we have just seen, that the State, by reason of its sovereign character, is not liable for that negligence, and this rule is the reason and basis of the decision in the Eggleston case. As the Supreme Court of Montana said, in *Mills vs. Stewart*, 76 Mont. 429, 247 Pac. 332:

> "The state, like any other corporation, can act only through agents, and if the state of Montana were a private corporation, it would be responsible to Rietz in an action at law for the damages resulting proximately from the negligence of its agent in charge of the dormitory building. But the state is a public corporation, and out of considerations of public policy the doctrine of *respondeat superior* does not apply to it unless assumed voluntarily. In other words, the state is not liable for the negligent acts of its agents unless through the legislative department of government it assumes such liability."
>
> *Mills vs. Stewart*, 76 Mont. 429, 247 Pac. 332, 333, decided in 1926.

In *Lewis vs. The State*, 96 N. Y. 71, the New York Court of Appeals stated that it was aware of no principle of law nor of any adjudged case which applies the doctrine of *respondeat superior* to a sovereign state or makes it liable for the negligence or misfeasance of its agents or officers. In *Murdock Grate Co. vs. Commonwealth*, 152 Mass. 28, the statement was approved that "no government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents."

When, therefore, by reason of the sovereignty of the State and the public policy incident thereto, it cannot be sued and the doctrine of *respondeat superior* does not apply to it, of course the law as laid down in *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, cannot be invoked against such sovereign state, for that rule requiring prompt presentation of checks is founded upon amenability to suit, upon *respondeat superior*.

But a railroad company is not a sovereign; it is not immune from suit. The Eleventh Amendment to the Federal Constitution does not apply to it. There is no public policy which provides that its functions are of so high and governmental a character as to give it the privilege of saying that no one can bring an action against it without its consent. The law is settled everywhere that the rule of *respondeat superior* does apply to a railroad company. None of the elements which exist in the case of a sovereign state exist in the case of the railroad company, none of the reasons upon which the decision in *Eggleston vs. Plowman*, 19 S. D. 609, 207 N. W. 981, is founded, relate to a private railroad corporation. The decision in that case applies only to government; it was never intended to apply to individuals, whether natural persons or corporations, and the rule of *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37, remains in full force and effect, applicable as well to private railroad corporations as to natural persons.

VII.

THE DEVICE WHICH THE RAILWAY COMPANY SEEKS TO USE TO PREVENT THE GENERAL RULES OF LAW APPLICABLE TO OTHERS FROM GOVERNING ITS OWN CONDUCT AND TO ESCAPE RESPONSIBILITY FOR THE CONSEQUENCES OF ITS OWN ACTS IS THE INTERSTATE COMMERCE COMMISSION RULING REGARDING FREIGHT CHARGES AND AN ATTEMPTED EXTENSION OF THE RULE OF LAW THAT FREIGHT BILLS CANNOT BE COMPROMISED BY DELIVERY OF SOMETHING OF UNCERTAIN VALUE. THAT RULING AND THAT RULE OF LAW DO NOT GOVERN THIS CASE.

This involves discussion of assignments of error Numbers 1 to 7, inclusive.

Paragraph 7 of Section 6 of the Interstate Commerce Act, Title 49 of United States Code, provides as follows:

> "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of

passengers or property, except such as are specified in such tariffs."

(49 U. S. C., Sec. 6, Par. 7.)

At the trial in the District Court, respondent asserted that Conference Ruling No. 207 of the Interstate Commerce Commission was sufficient to cut across all of the ordinary rules of law governing individual rights and to insulate the railway company from the consequences of its own wrong in improperly dealing with the check. This contention seems to have had great weight with the trial court, for he quoted the conference ruling in his decision (R. 13-14) as one of the reasons therefor. This ruling is as follows:

"207. Payment for Transportation. Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules."

(Adopted by the Interstate Commerce Commission September 15, 1906.)

It will be noted that the principal thing with which the Commission was there dealing is the matter of discrimination, for the Commission gives as the reason and basis of its ruling the view that the prohibition in the law against varying from established rates "precludes the acceptance of service, property or other payment *in lieu* of the amount of money specified in the published schedules." (Italics our's.)

In the case at bar there was no attempt to deliver service, property or other payment in lieu of the amount of money specified in the published schedules. Instead, the intention was to deliver $375.96, the exact amount of money required. That intention would have been completely carried out but for the railroad company's wrongful handling of the check. Checks are orders for the payment of money; they are not orders for delivery of "service, property, or other payment." Accordingly, they do not come within any of the things at which Interstate Commerce Commission Ruling 207 was aimed.

Everywhere freight charges are paid by check. Practically every freight bill at Kimball was paid by check from 1922 to June 19, 1926 (R. 22, 40, 45, 48). Practically every freight bill at all of the many yards (nearly 100 of them) of Fullerton Lumber Company has always been paid by check. Fully ninety-eight per cent of the remittances in modern business life are made by check, and to now require such remittances to be made in gold, or greenbacks, would place such an obstacle in the way of the free flow of payments as would seriously disrupt the course of modern commerce and trade.

And why are such remittances practically universally made by check? Because a check is a safe and convenient method of paying, "not service, property, or other payment," but money. It is an easy and facile method of transmitting and delivering the exact amount of money or cash required to be paid, it is easy to send by mail or other transmission agency, and its use facilities bookkeeping and the accurate recording of payments of money.

In *Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675, 677-678 (C. C. A., Sixth Circuit, 1924), the Circuit Court of Ap-

peals ruled to the contrary of respondent's contentions, saying:

> "While the statute requiring every shipper and consignee of freight to pay the full published scheduled rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected."

The case just cited shows with conclusive effect that the Interstate Commerce Act in its provisions against discrimination in charges does not abrogate the Law Merchant or deprive a shipper of the benefit of the salutary rule that he is not to be held liable for a non-payment in currency of freight charges caused by the act of the carrier.

In *Pennsylvania R. R. Co. vs. Olivit Brothers*, 243 U. S. 574, an action by a shipper for damages for negligent transportation of carloads of watermelons, the carrier sought to prevent the shipper from recovering as part of the damages the freight charges paid, by recourse to the same section of the Interstate Commerce Act relied upon by respondent in the case at bar. The defense was that such recovery would violate the statutory prohibition against discrimination. This Court overruled the defense, holding it untenable in the absence of a showing of an actual or attempted evasion of the statute. We deem the case at bar similar in its essential questions to the Olivit case.

There is nothing in Interstate Commerce Commission Conference Ruling 207 which, either in terms or by implication or otherwise, forbids the use of checks in transmitting and remitting money. A check in nowise comes within the practices of discrimination at which that ruling was aimed. That ruling says nothing about checks, makes no reference to the

common business practice of remitting payments of money by means of checks, and to attempt now to spell out of it a prohibition against use of checks in making remittances is to inject something into that ruling which it does not contain and never was intended to contain.

The same thing is true of the cases cited by respondent at the trial and relied upon by the lower courts in their opinions, *Louisville & Nashville Railway Company vs. Mottley*, 219 U. S. 467, *Chicago, Indianapolis & Louisville Railway Company vs. United States*, 219 U. S. 486, and *New York Central & Hudson River Railroad Company vs. Gray*, 239 U. S. 583. In the first of these cases Mottley and wife had been injured in a train wreck and made claim against the railroad for damages. There was no trial or other adjudication of the amount of these damages, but the railroad company settled the claims without trial by agreeing to issue Mottley and wife free passes on passenger trains for the remainder of their lives. The Court held that this agreement was not binding on the railroad company, for the reason that there was nothing definite or certain about the claim for damages, to allow it to be thus traded for free passes opened the door to discrimination, and that money only, and not uncertain claims, services or property, was receivable in payment of passenger fares. In the second of these cases, *Chicago, Indianapolis & Louisville Railway Company vs. United States*, 219 U. S. 486, the Munsey Magazine Company entered into an agreement with the railroad to give it a certain amount of advertising in exchange for free passenger passes. The Court held that this agreement was in violation of the rule that the railroad could not exchange transportation for property or service, and must receive the amount of money specified in the published tariffs of rates. *New York Central & Hudson River Railroad Company vs. Gray*, 239 U. S. 583, was a like case, wherein the

railroad company agreed to buy a map for $750 and the seller agreed to accept $150 in cash and the remainder in passenger tickets in payment. The Court held that this trade of passenger transportation for property could not be made.

We have no desire or need to in any way criticise these cases. They are undoubtedly well decided and represent the law. But they do not apply to or cover a case like that at bar. They say nothing concerning the general business practice of remitting money by check. Every word in each of these cases is entirely consistent with the view for which we contend. They do not deal with the question whether, when a railroad accepts a check drawn for the sum of $375.96 in money in payment of freight charges, and then negligently fails to present that check for payment as the law requires it to do, so that loss is caused the drawer, it can saddle that loss onto the drawer in spite of its own wrongful act.

The Interstate Commerce Commission Conference Ruling and the cases which respondent cites provide that the carrier cannot charge, collect or receive a greater, less or different compensation than the rates specified in the tariffs, and that the collection of rates must be in money and may not be in property or services, but the force and effect of these rulings is to prevent discrimination in charges and there is nowhere to be found in them any provision which abrogates the rules of the Law Merchant in favor of a carrier or which is intended to or does put a stop to the well-nigh universal practice of making remittances of money by means of checks. Nowhere is it held that the carrier may not accept an order for money and undertake to go to the bank and get the currency in payment of a freight bill. The universality of this modern method of remitting money is well illustrated by *City of El Paso vs. Two Republics Life Insurance Company,* Texas 1925, 278 S. W. 231.

A check drawn on a bank and given to that bank in payment of a sight draft is a payment in cash, although no currency or greenbacks or gold or silver actually change hands (*Andrews vs. Hartley State Bank*, 207 Iowa 407, 219 N. W. 929). This is true, although a bill of lading is attached and the freight charges thereon must be paid in order to get the goods (*Messenger vs. Carroll Trust and Savings Bank*, 193 Iowa 608, 187 N. W. 545). As the Court said in the case last cited:

> "* * * this method of collection was the full equivalent of the payment of money * * *. We deem it clear that the net result of the transaction of payment by the Swaney Company and the receipt thereof by the collecting bank was the same as though the Swaney Company had drawn the currency into its own hands by means of check, and had thereupon delivered the same to the collecting bank in payment of the sight draft. Such is the holding of the cited cases."
>
> (*Messenger vs. Carroll Trust & Savings Bank*, 193 Iowa 608, 187 N. W. 545.)

The rule is that the check is the mechanism or means by which the money is remitted and paid, thus avoiding the inconvenience of going to the bank each time and obtaining a large roll of greenbacks or a heavy sack of silver or gold. The respondent railroad company in this case contends that that mechanism or means cannot be used, that in every case wherein freight charges are concerned the shipper must himself go to the bank and obtain the roll of bills or the sacks of silver and gold and convey them to the agent of the carrier. But the authorities are to the contrary. See, among others, the following:

Montgomery County vs. Cochran, 121 Fed. 17 (C. C. A., Fifth Circuit, 1903).

Bennett vs. Bank of Commerce and Trust Co., 229 Fed. 950 (Dist Ct., Miss., 1914).

Andrew vs. State Bank of Dexter, 204 Iowa 565, 215 N. W. 742.

Palmer vs. Golden, 127 N. Y. Misc. 487, 216 N. Y. S. 509.

Abeles vs. Guelick, 101 N. J. E. 180, 137 Atl. 853.

In *Montgomery County vs. Cochran*, 121 Fed. 17, an Act of the Legislature of Alabama provided for the issuance and sale of certain county road bonds, and that "the proceeds of said bonds shall be paid over to and kept by the treasurer of said county" and he shall be "responsible for the safekeeping of all of the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer." Cochran, as county treasurer, by one Kohn, his agent, who was in the employe of a banking house, gave the county board a receipt for $111,109.58, proceeds of the bonds, they were immediately sold, and Kohn took therefor the check of the banking house, Josiah Morris & Co., for that amount. He indorsed the check in the name of the county treasurer, made out a deposit slip and deposited the check in the bank to the credit of the county treasurer, Cochran. No money actually passed as between the purchaser of the bonds and the county treasurer. Seventeen days later, the bank closed its doors, and this action was brought against the county treasurer and his bondsman to recover the proceeds on the ground that the treasurer had failed to keep them safely. The defense was that there were in fact no proceeds, because the treasurer had no right to receive anything but coin or bank bills in payment for the bonds, and, therefore, that there was no legal payment for them by means

of the check. The Court held that this contention was unsound, in trenchant language directly applicable to the construction of the Conference Ruling upon which respondent herein lays so much stress:

"Was it the intention of the Legislature that no transactions with the board of revenue and the purchaser of the bonds and the treasurer should be permitted except by the use of coin or bank bills? The statute must be construed in the light of commercial usage and common knowledge of business transactions. The word 'money,' when used as in this statute, does not mean only coin and bank bills. 'Such a construction,' said Lyon, C. J., in *State vs. McFetridge*, 84 Wis. 473, 515, 54 N. W. 1, 10, 998, 20 L. R. A. 223, 'would be extremely technical, and is, we think, uncalled for. "Money" is a generic term and may mean not only legal tender coin and currency, but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representatives of value.' And it was held that a certificate of deposit was money within the meaning of a statute. In *Taylor vs. Robinson* (D. C.), 34 Fed. 681, Judge McCormick said: 'The term "money" is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term "land" designates all real estate.' In *Allibone vs. Ames*, 9 S. D. 74, 81, 68 N. W. 165, 167, 33 L. R. A. 585, the Court applies this definition to a certificate of deposit: 'When the certificate of deposit was delivered to plaintiff, and accepted by him, it had all the characteristics of money. Its return to the bank must be regarded as a deposit of that amount of currency. It was, the parties so treating it, precisely the same as if the treasurer had received the

coin and again deposited it. To say that if a person deposits a draft or certificate of deposit with a bank, and receives credit for the amount of it, he does not make a deposit of that amount, is simply absurd, in view of the modern methods of transacting business.'

And there are other authorities to the same effect, showing that the words 'funds or money' and 'proceeds of sale,' as used in the act, should not be confined in their meaning to coin and bank bills. *State vs. Krug*, 12 Wash. 288, 41 Pac. 126; *Byrom vs. Brandreth*, 16 L. R. Eq. Cases, 475; *State vs. Hill*, 47 Neb. 456, 66 N. W. 541; *People vs. McKinney*, 10 Mich. 55; *Bork vs. People*, 16 Hun. 476.

The use of checks, certificates of deposit, and other commercial instruments is so universal and so essential in large transactions that we cannot assume that the Legislature of Alabama meant to forbid their use in the negotiation and sale of the bonds. If Josiah Morris & Co. had had the coin on hand to pay for the bonds in question, the transaction would have been conducted by the use of checks or certificates of deposit, and we think without any violation of the terms of the statute. If silver coin had been in bank as the basis of the transaction, its weight (about 6,456 pounds) would have made the use of checks or certificates necessary to conveniently complete the transaction. We think, therefore, that checks or certificates of deposit received in good faith by the board of revenue, and delivered to the treasurer, or delivered by direction of the board of revenue to the treasurer, would be 'funds or money' or the 'proceeds of sale' of the bonds in the hands of the treasurer. The check for the price of the bonds in the hands of the treasurer, he having receipted for the same as money,

was 'funds or money' in his hands, within the meaning of the statute. * * *"

> Per *Shelby*, Cir. J., *Montgomery County vs. Cochran*, 121 Fed. 17, 21-22 (C. C. A. Fifth Circuit, 1903).

If this reasoning of the Circuit Court of Appeals of the Fifth Circuit is correct, and we have every reason to believe that it is, there is no basis whatever for respondent's contention, upon the soundness of which its whole case rests, to the effect that the Interstate Commerce Commission ruling requires payment of freight bills in gold or silver coin or greenbacks. So technical and narrow a definition of the term money is unsound and unauthorized, and is wholly unsuited to and out of touch with the current of modern commercial life.

In *Bennett vs. Bank of Commerce and Trust Company*, 220 Fed. 950, decided in the District Court of Mississippi in 1914, the decision and reasoning of *Montgomery County vs. Cochran*, 121 Fed. 17, were approved and followed, and Judge *Niles* therein said:

> "Commercial usage in the everyday safe and convenient practice of treating checks as money is almost universal, and the legality of such a payment in the instant case is well settled and especially binding upon this Court, upon the authority of *Montgomery County vs. Cochran*, 121 Fed. 17, 57 C. C. A. 261."

In *Palmer vs. Golden*, 127 N. Y. Misc. 487, 216 N. Y. S. 509, the Court said:

> "* * * In principle there is no legal difference between the check and the cash."

In *Abeles vs. Guelick*, 101 N. J. E. 180, 137 Atl. 853, objec-

tion was made that there was no valid payment of the proceeds of a mortgage to the mortgagor, because a check therefor was given. The question was whether these had been paid in money. The Court held that they were so paid and said:

> "Objection is based on the fact that a check instead of cash was delivered to the mortgagor. This objection is unsound. If actual cash was not advanced, it was the equivalent of cash, and by delivery of the check the mortgagee put it in the power of the mortgagor to immediately convert the check into cash. The check was payable on presentation at the Broad & Market National Bank in Newark, N. J. In modern business transactions checks pass as cash, and, while not legal tender or actual cash, commerce and trade would be very much restricted, if checks were not accepted in lieu of cash. Where so accepted they should be so considered by the courts."
>
> *Abeles vs. Guelick*, 101 N. J. E. 180, 137 Atl. 853.

It is in the light of these authorities that the narrow, restricted, and technical nature of the respondent's construction of the Interstate Commerce Commission ruling is clearly apparent. Respondent first is compelled to say that this ruling must be construed to mean that gold and silver and greenbacks are the only medium or mechanism of payment which can ever be accepted in payment of freight bills, and this in the face of the fact that there is not one word in that ruling or in the Supreme Court cases dealing with the subject which so states or so requires. Then next respondent says that, as so construed, it is entitled to take advantage of the ruling to put the burden of loss upon petitioner, even though it was solely through the wrongful act of respondent

that coin or greenbacks were not obtained. Such a position is not only unjust: the legal device by means of which respondent seeks to achieve it is wholly ineffective for the purpose for which respondent seeks to use it.

In its argument in the trial court, respondent made the following statement:

> "The identical question was submitted to the Circuit Court of Brule county, South Dakota, in the case of *C. M. & St. P. Ry. Co. and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the C. M. & St. P. Ry. vs. Bradshaw*, and decided by his Honor Judge Bakewell on June 25, 1928. This, of course, was not an Appellate Court but the check was received at the same station on the same bank and on the strength of the decisions quoted above, the Court held the railway company was entitled to be paid in cash and the charges were paid by Bradshaw."

This was the Bradshaw check referred to by Gustafson (R. 20). Our investigation of this case shows that this information regarding it is in error. We believe that this case was uncontested and there was no decision of any kind by the Court. The parties entered into a stipulation of settlement, wherein the railway company agreed to reduce the claim somewhat if it would be paid and Bradshaw thereupon agreed to pay. The case is of little value as a precedent, there being no contest and no decision by the Court.

The case of *Chicago, Rock Island & Pacific Railway Company vs. Fullerton Lumber Company*, decided in the District Court of Pocahontas county, Iowa, is, however, identical in its facts with the case at bar, although the parties are different, and that lower state court case was genuinely contested and the Court therein made and rendered its decision

in favor of the defendant and against the railway company, on or about October 20, 1928. As the authorities stand in the trial courts of state jurisdictions, therefore, they are in favor of the petitioner herein.

VIII.

Adoption of Respondent's Views Would Annul the Law Merchant and Result in Great Inconvenience in the Transaction of Modern Business.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The well-nigh universal custom is, as we have heretofore seen, to pay freight charges by check. The Fullerton Lumber Company, a large concern operating about a hundred yards, has always employed that method. Nearly all business houses of any size do likewise. It would be almost impossible to carry around large quantities of greenbacks and gold and silver coins, and every time a car of lumber or coal comes in count out a handful or a sackful and transfer it to the railway agent in return for a receipt of the freight bill and release of the shipment. Yet that is the practice for which the respondent here contends. The difficulties of protection would become very considerable, and it would be necessary to employ extra men at many yards for the sole purpose of guarding the coin, in a manner similar to that required by the banks when transporting gold and currency about a city. It can be done, but at much expense and trouble, and would result in impeding and restricting the quiet, orderly, smooth and rapid flow of remittances which means so much to the efficient conduct of modern, complex business operations.

In the case of this petitioner, it was necessary, as soon as

Judge Dewey rendered his decision, to notify every yard located on the Milwaukee Railroad, about forty of them, not to pay any more freight bills by check. This has added to the burdens of the men in charge of these yards, has required additional time in the making of remittances, has in some instances disturbed existing financial arrangements and adversely affected good-will at certain of the local stations, upon the favorable growth of which the present volume and future growth of the business largely depends.

Bouvier defines the Law Merchant as follows (*Law Dictionary*, 3rd Ed., page 1882):

> "The general body of commercial usages in matters relative to commerce. * * * These usages, being general and extensive, partake of the character of rules and principles of law, not of matters of fact, as do usages which are local or special. They constitute a part of the general law of the land, and, being a part of that law, their existence cannot be proved by witnesses, but the judges are bound to take notice of them *ex officio;* Winch. 24; and this application is not confined to merchants, but extends to all persons concerned in any mercantile transaction. * * * The development of the law merchant as part of the common law has continued without ceasing. Evidence of living general usage is still admissible to add new incidents to its contents, provided they do not contradict any rule already received."
>
> *Bouvier, Law Dictionary*, 3rd Ed., page 1882.

It has been the source of much that is progressive in the common law concerning trade, and commerce, and concerning transportation, upon which our modern trade and commerce is so closely dependent. To now go backward, as re-

spondent contends we must do, and construe an Interstate Commerce Commission ruling so as to exclude payment of freight bills by check, selecting such a construction by design where neither the words nor plain intent thereof require it, would be unwise, would amount to impeding the flow of commerce and trade at a time when every effort is being made by businessmen to speed it up and facilitate prompt deliveries and equally prompt and facile remittances. The contention of the respondent is not required by anything in the law and is a viewpoint promotive of business friction and difficulty.

It is the universal custom of businessmen to make remittances by check. To adopt respondent's view would annul that custom in so far as it applies to the large field of remittances in payment of freight charges. No merchant could afford to run the risks of loss which remittance by check would entail if the respondent's views were to prevail.

IX.

The Words on the Check "Collectible at Par Through Federal Reserve Bank at Minneapolis" Are No Justification for Respondent's Failure to Promptly Present the Check for Payment.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

This point was not raised in the trial Court. It was raised by respondent for the first time in its brief in the Circuit Court of Appeals. It is wholly outside of the record. Had respondent any real faith in it, respondent would have raised it in the trial Court and would have produced the testimony of bankers to show the true meaning of these technical words. No such testimony was produced, and, in its

absence, we may properly conclude that such testimony would not have been favorable to respondent's contention.

The single case cited by respondent, *Spokane Valley State Bank vs. Lutes*, 133 Wash. 66, 233 Pac. 308, decided by the Supreme Court of Washington, has no application. It does not deal with or refer to the statement printed on this check nor to any words of similar import or character. It does not involve a check drawn on a bank in the same city or town in which the drawer resides and in which the check was delivered. And, finally, there was introduced in that case affirmative evidence showing that it was in accordance with the custom of Washington banks to send an interstate item drawn on a Billings bank through the Federal Reserve Bank at Helena, by which it was forwarded direct to Billings, instead of itself sending the check direct to Billings. We have no such testimony in the case at bar, nothing to show that it was the custom of local people or local banks at Kimball to send checks drawn on the Lumbard State Bank of Kimball six hundred sixty miles southeast to Chicago for collection. Such a custom would have been absurd even if it could have been shown but it was not shown and could not have been shown.

The words, "Collectible at Par Through Federal Reserve Bank at Minneapolis," have nothing whatsoever to do with the time, manner, or place of presentation of a check for payment. They do not alter any of the applicable rules of law or affect the situation in any way. They originated in a circular letter of the Federal Reserve Bank of Minneapolis, sent to all of its members, Circular No. 35, dated June 15, 1916. In that circular the Federal Reserve Bank, among other things, stated:

> "It is requested that you have all checks drawn on your bank stamped or imprinted, 'Collectible at par

through the Federal Reserve Bank of Minneapolis,' thus announcing the fact that your checks are not subject to exchange charges. * * *"

The whole purpose of these requested words was to inform holders of these checks at points distant from the home town of the bank that it was not necessary for them to pay a discount or other so-called exchange charge in order to have the check paid, and that, if anyone did attempt to collect such discount or make an exchange charge, the exaction could be avoided by sending the check to the Federal Reserve Bank. But such information could have no value or importance where the check was drawn and delivered in the same town as the bank on which it was drawn was located, for then there could arise no possible question of discount or exchange charges; the bank on which it was drawn, of course, had to pay the full face amount and all that it was necessary for the holder to do was to present the check over the bank's own counter at the town in which he and the bank both lived. It cannot possibly be spelled out of these words, as we think, that there was any intention to abrogate the applicable rules of law requiring prompt presentment when the bank is located in the same town, and in such case the whole question of par collection to which these words were directed does not arise and cannot exist.

In Circular Number 193, dated January 15, 1920, the Federal Reserve Bank of Minneapolis again called the attention of its members to the matter, in the following words:

"It is requested that you have all checks drawn on your bank stamped or imprinted, 'Collectible through the Federal Reserve Bank of Minneapolis,' thus announcing the fact that your checks are so collectible. * * *"

This same request was repeated in the same language in Circular Number 227, dated October 1, 1920, and Circular Number 245, dated April 1, 1921. In Circular Number 358, dated January 1, 1927, which is the one now in effect, the Minneapolis Federal Reserve Bank amplified its statement of the matter, and while this most recent circular was issued after the date when the transaction involved in the case at bar occurred, it well illustrates the original purpose of the request and the continuity of the policy upon which it was based when originally made in 1916, and is as follows:

"SECTION VI.

"COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK AT MINNEAPOLIS.

"Member banks are entitled to place the words 'Collectible at par through the Federal Reserve Bank of Minneapolis' on their own checks and the checks used by their depositors. Your attention is called to the desirability of availing yourself of this privilege."

"SECTION IX.

"INDIRECT ROUTING.

"In the interests of good banking, the indirect routing of checks will be discouraged and member banks will not be permitted to deposit with us or send direct to other Federal Reserve Banks or branches for our account, any checks payable in other Federal Reserve districts, which bear the endorsement of banks located in other Federal Reserve districts, in case where it is evident such checks have been routed indirectly."

The strained and heretofore unknown and unheard of meaning which respondent sought to read into these words

in its brief in the Circuit Court of Appeals is not only logically unwarranted by anything contained in the words themselves, but also is directly contrary to the policies of the Federal Reserve Bank which originally prompted the suggestion that these words be printed on the checks. The policies of the Federal Reserve Bank are directed toward speeding up exchanges, making them more direct, reducing the time required for transmittal, eliminating all obstacles to quick, reliable transit of checks and eliminating also any charges or discounts which might interfere with par collection. The charging of exchange was the barrier to which the words "Collectible at par through the Federal Reserve Bank of Minneapolis" were aimed. The Federal Reserve Bank sends all of its items directly to the bank upon which they are drawn. It has cut the times formerly required for transmission of checks just about one-half. It has co-operated with the National Association of Credit Men in promoting par collection. Charging of discount or exchange promoted indirect routing of checks, for that was the method used to evade payment of exchange. The whole energy of the Federal Reserve Bank has been directed to prevent indirect routing.

Yet respondent, in the Circuit Court of Appeals, made the argument that one of the measures taken by the Federal Reserve Bank to prevent such indirect routing may be used instead to promote it! Surely nothing could be more foreign to both the spirit and the letter of these words as so printed on the check, and respondent's argument contains on its face its own refutation. It would be impossible to find a more striking example of indirect routing than the course which the check here in question took at respondent's hands.

We realize that the authorities to which we here refer are not public records. But these circulars are all on file at the

Federal Reserve Bank at Minneapolis, and they have been made available to us through the courtesy of Mr. Harry Yaeger, Deputy Governor of the Minneapolis Federal Reserve Bank, and Mr. Gray Warren, its cashier, with the understanding that these authorities are equally available to the other side and to the Court. The accuracy and fairness of our statements as to the meaning and effect of the words here in question may be fully checked and verified at that source.

X.

The Trial Court Should Have Granted Defendant Leave to Interpose in This Action Counter-Claim for the Loss Caused by Respondent's Wrongful Acts.

This involves discussion of assignment of error Number 8.

The opinion of the Circuit Court of Appeals for the Eighth Circuit in this case upholds denial of permission to interpose counter-claim in this action, on the broad ground taken by the trial court, holding that even a counter-claim arising out of the very transaction for which action is brought cannot be interposed where the subject-matter of the action is a claim to recover freight charges (*Fullerton Lumber Co. vs. C. M. St. P. & P. R. R. Co.*, 36 F (2d) 180; R. 81-82; 54-55).

This ruling is disposed of by the decision of this court in *Chicago & Northwestern Railway Company vs. Lindell*, 281 U. S. 814, argued January 23, 1930, and decided February 24, 1930, which holds to the contrary and settles the law upon the subject. In the Lindell case, Mr. Justice Butler said, for the court:

> "The adjustment of defendant's demand by counter-claim in plaintiff's action rather than by independent

suit is favored and encouraged by the law. That practice serves to avoid circuity of action, incovenience, expense, consumption of the court's time, and injustice. *Rolling Mill Co. vs. Ore & Steel Co.*, 152 U. S. 596, 615, 616. *Railroad Company vs. Smith*, 21 Wall. 573, 579. *Partridge vs. Insurance Company*, 15 Wall. 573, 579. In the case last mentioned the court, speaking through Mr. Justice Miller, said (p. 580): 'It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held and escape the liability which the laws of the state have attached to all plaintiffs of allowing just and legal set-offs and counter-claims to be interposed, and tried in the same suit and in the same forum.'

The practice of determining claims of shippers for loss or damage in suits brought by carriers to collect transportation charges is not repugnant to the rule prohibiting the payment of such charges otherwise than in money. The adjudication in one suit of the respective claims of plaintiff and defendant is the practical equivalent of charging a judgment obtained in one action against that secured in another. Neither is to be distinguished from payment in money.

It is well understood that payment by carriers to shippers under the guise of settling claims for loss and damage may in effect constitute discrimination that the Act was intended to prevent. But it is not suggested how opportunity for collusion in respect of such matters would be lessened by abolishing counter-claims in cases such as this. Collusion and fraud may be practiced in the defense and settlement of separate actions brought on such claims as well as when the same matters

are put forward as off-sets or counter-claims.

The Act ought not to be construed to put aside state laws and long established practice in respect of pleading unless the intention of Congress so to do is plain. There appears no reasonable probability that the relegation of shippers to separate actions for the enforcement of their claims for loss or damage would operate more effectively to enforce the purpose of Congress to prevent discrimination. There is no substantial ground upon which the Act may be given the construction for which the carrier contends."

Butler, J., *Chicago & N. W. Ry. vs. Lindell,* 281 U. S. 14, 15-18.

The statutes of Minnesota make the pleading of a counter-claim permissive. Mason's General Statutes of Minnesota, 1927, Sec. 9253, provides:

"9253. *Contents of Answer*—The answer shall contain:

1. * * *

2. A statement, in ordinary and concise language, of any new matter constituting a counter-claim or defense.

3. * * *"

The requisites of a counter-claim are set forth in Section 9254 as follows:

"9254. *Requisites of counter-claim—Pleading does not admit*—The pleading of a counter-claim shall not be construed as an admission of any cause of action alleged in the complaint. Such counter-claim must be an existing one in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and must be:

1. A cause of action arising out of the contract or

transaction pleaded in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action, or

2. In an action arising on contract, another cause of action arising also on contract, and existing when the action was begun."

(*Mason's General Statutes of Minnesota*, 1927, Secs. 9253, 9254.)

It is obvious that the counter-claim which petitioner here sought to interpose meets these requirements.

While the trial court decided this particular action in favor of the respondent, and held that the respondent was entitled to recover, and to place the loss due to the closing of the bank in the first instance upon the petitioner, nevertheless the trial court reached this result with great reluctance, deeming himself precluded from a different view by reason of the Interstate Commerce Commission Conference Ruling No. 207, and the cases in this court dealing with the same subject.

This decision did not mean, however, that the trial court really felt that the loss should rest upon the petitioner, for the trial court made this reservation in his decision (R. 14):

> "This decision and the following judgment is made without prejudice to the defendant to bring an action against the plaintiff or its assignor for loss resulting from the failure to present the check for payment within a reasonable time, or any other negligence or negligent acts on the part of this plaintiff or its assignor."

After the making of the decision, petitioner duly moved for a new trial (R. 54), and as one of the grounds of that motion asked for leave to amend the answer so as to include a counter-claim for respondent's negligence in not properly

dealing with or presenting the check for payment. This motion was denied (R. 55), and error was duly assigned directed at such decision in the Circuit Court of Appeals (R. 75), and has been duly assigned here (No. 8, *Petition for Certiorari*, page 19, *supra*, page 12).

This portion of the decision of the trial court well illustrates what was in his mind. He did not think that respondent was entitled to the decision upon the merits but only held that any other decision was precluded by paramount authority.

Prior to the decision of the Lindell case, the authorities were in hopeless confusion on this question of allowance of counter-claim. Prior to the decision in the case at bar there was no decision by a Circuit Court of Appeals on the question. The following authorities permitted counter-claim in actions to recover freight charges:

Chicago & North Western Railway Company vs. Lindell, 281 U. S. 814; *C. M. & St. P. Ry. Co. vs. Pioneer Grain Corp.*, 26 F. (2d) 90 (Dist. Ct., Minn., Judge John B. Sanborn); *Payne vs. Clarke*, 271 Fed. 525 (D. C. S. D. Calif., Judge Bledsoe); *C. & N. W. Ry. Co. vs. Tecktonius Mfg. Co.*, 262 Fed. 715 (D. C. E. D. Wis., Judge Geiger); *Wells Fargo & Co. vs. Cuneo*, 241 Fed. 727 (D. C. S. D. N. Y., Judge Mayer); *Central of Georgia Ry. Co. vs. Birmingham Sand & Brick Co.*, 9 Ala. App. 419; *Battle vs. Atkinson*, 9 Ga. App. 488; *Penn. R. Co. vs. Bellinger*, 101 N. Y. Misc. Rep. 105; *N. Y. Central R. Co. vs. Federal Sugar Co.*, 201 N. Y. App. Div. 467; *Nashville, C. & St. L. Ry. vs. Tennessee Mill Co.*, 143 Tenn. 237.

The following cases denied right of counter-claim: *Michigan Central R. Co. vs. Piowaty*, 36 F. (2d) 604 (D. C. N. D. Illinois, Judge Woodward); *Fullerton Lumber Co. vs. Chicago, M. St. P. & P. R. R. Co.*, 36 F. (2d)

180 (C. C. A., 8th Circuit, Judge Woodrough); *Pennsylvania R. Co. vs. South Carolina Produce Ass'n,* 25 F. (2d) 315 (D. C. E. D. South Carolina, Judge Cochran); *Johnson-Brown Co. vs. Railroad,* 239 Fed. 590 (D. C. S. D. Georgia, Judge Speer); *C. & N. W. Ry. Co. vs. Stein Co.,* 233 Fed. 716 (D. C. Neb., Judge Munger); *Illinois Central R. Co. vs. Hoopes,* 233 Fed. 135 (D. C. S. D. Iowa, Judge Wade); *D. L. & W. R. R. Co. vs. Nuhs Co.,* 93 N. J. Law 309; *Adams Express Co. vs. Albright Bros.,* 75 Pa. Super. Ct. 410.

Even if the District Court cases denying counter-claim were the law, they could not govern the case at bar. For here we do not have a counter-claim for an injury to the shipment, or for some negligent delay or other act or omission affecting carriage of the goods. Here we have a counter-claim for a negligent act of the carrier in dealing with a check, the very purpose of the delivery of which was the payment of the freight charges. The achievement of that purpose was defeated only by the act of the carrier in failing to make proper and timely presentation of the check for payment.

In *Wells Fargo & Co. vs. Cuneo,* 241 Fed. 727, decided in the District Court for the Southern District of New York, Judge Mayer said:

> "The provisions of the act in question were never intended to deprive a shipper or consignee of his lawful remedies against the carrier for such breaches or wrongful acts as the carrier may have committed."

Some confusion in the decisions may have been originally caused by an Interstate Commerce Commission Ruling, Number 48, but this ruling has since been withdrawn.

Plain justice would seem to require that a shipper, who has a valid claim against a carrier for wrongful act and

negligence in dealing with a check delivered and accepted in payment of freight charges, be not subjected to the expense, trouble and delay of bringing a separate and distinct and different action against the carrier and be precluded from right of set-off therefor in an action for the freight charges. There is no just reason for requiring such circumlocution, and enforcement of the policy of the Interstate Commerce Commission to prevent discrimination in freight charges does not necessitate any such requirement.

The wrongful acts and the negligence of the respondent are plainly evident in the record herein. That the loss is complete and equal to the full amount of the check is also clearly shown (R. 43-44; 49). To require petitioner to bring a separate action against respondent, go to the expense and difficulty of bringing witnesses to Minneapolis, and go through all of the different operations of a lawsuit a second time, when the evidence and the facts to be shown by that evidence would all be identical with the evidence and the facts already produced and shown and embodied in the record herein, would amount to nothing but a hardship and impediment placed in the way of obtaining substantial justice, an added obstacle to the placing of the loss in this case where it belongs, namely, upon the respondent railway company.

Therefore, we submit that if to any extent the views of the courts below as to the effect of Interstate Commerce Commission Conference Ruling Number 207 are to be adhered to, then, at all events, a new trial should be granted, with permission to interpose counter-claim in this very action, so that, under the situation then prevailing, there may be full opportunity to achieve the result which the trial court himself appears to have had originally in mind, namely, that the ultimate loss should nevertheless fall upon the respon-

dent railway company, whose wrongful act has caused it. We do not adhere to the views of the lower courts regarding the effect of the Interstate Commerce Commission Conference Ruling Number 207 upon a case such as we have at bar, and we do not in any respect recede from our view that, upon the merits of that proposition, the decision should be in favor of petitioner. But we do here submit that even if the views of the courts below on that issue were to be adhered to, nevertheless the essence of their views is that the ultimate loss should fall upon the railway company. And the petitioner herein should not be compelled to first give the carrier what it seeks in this action and then be put to the hardship of bringing an entirely separate action to recover something back, if it be possible, against the determined opposition of the railway company.

XI.

The Dictates of Substantial Justice and Fair Dealing Require a Decision in Petitioner's Favor.

This involves discussion of assignments of error numbers 1 to 7, inclusive.

The trial court himself did not look with favor upon the position which the railway company takes in this case. The carrier substantially admits that its neglect and wrongful act is the sole cause of the loss. Even if it did not admit it, there could not be any differences of opinion on that issue as the evidence stands in the record in this case. It would have been a simple matter for Mr. Yarosh to have obtained the currency or the gold and silver from the bank and have delivered it to Gustafson, had Gustafson so required. But Gustafson never made any such demand and the whole course of dealing between the parties, as far back as 1922, indi-

cated that the carrier never intended to make any such requirement. Gustafson himself admits that "had we known what was going to happen, we could have probably avoided this trouble" (R. 72). Whose fault was it that currency was not obtained? Why didn't Gustafson, having accepted the check, take the trouble to walk two blocks up to the bank, immediately upon his acceptance of the check, and procure the currency or the coin? He then could easily have done it and Yarosh could not well have done it because the check for the money was out of his possession.

In such a situation, for the railway company to now seek to place the burden and the loss upon the petitioner is unjust and inequitable.

Respectfully submitted,

STANLEY S. GILLAM,
Attorney for Petitioner,
535 Metropolitan Bank Bldg.,
Minneapolis, Minnesota.

APPENDIX.

Reply to Statement by Letter Addressed to the Court by Counsel for Respondent.

We have received a carbon copy of a letter addressed by Mr. F. W. Root, attorney for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, resident at Minneapolis, dated August 18, 1930, reading as follows:

> "This is to advise the Court that after the petition for Writ of Certiorari was filed in this proceeding, an amount equivalent to that required by the judgment in the Court below was paid by the Petitioner to the Railroad Company and the latter gave to the Petitioner a satisfaction of said judgment; that the retention of said payment and the filing of the satisfaction were contingent upon the decision of this Court; that it was understood that said satisfaction would not be filed until after the decision by the Court and would then either be filed or returned consequent upon such decision; that it was understood and agreed between the parties that the payment of said monies and the giving of such satisfaction should in no way prejudice the appeal in this proceeding; that thereafter the decision in the case of *Little vs. Bowers*, 134 U. S. 547; 10 Sup. Ct. 620, was called to the attention of the parties; that this letter is written merely for the purpose of informing the Court of the exact facts and circumstances and thereby discharging our duty in that regard in the manner indicated in the Little case.
>
> It is not our desire, however, to prevent a decision by this Court in this proceeding on the important questions which the issues present and it will not be our pur-

pose to move a dismissal on the grounds above alluded to. We are in agreement with the position of the Petitioner that a determination of the issues involved is desirable and will be a guidance to the profession that will tend to minimize litigation.

Copy of this letter is sent to the attorney for the Petitioner."

The arrangement mentioned in Mr. Root's letter was originally initiated by him and we entered into it in good faith upon the express condition that it was not to prejudice in any respect the prosecution of the appeal or the rights of the Fullerton Company in bringing that appeal to a final decision in this Court. We had then no knowledge or intimation of the existence of the case of *Little vs. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, or of any rule of law or decision of similar import or one which might raise any question as to the propriety of such an arrangement. There was in fact no collusion or intent of collusion in the arrangement we made and no intent to affect the genuineness of the controversy in any respect whatsoever.

After the Petition for Writ of Certiorari had been granted, and on or about April 10, 1930, members of Mr. Root's office communicated with the undersigned and suggested, for the first time, that there might be some question about the propriety of the arrangement we had entered into, and requested a conference. At such conference, they produced the case of *Little vs. Bowers* and other authorities and requested that I examine these authorities and let them know what should be done about the matter. They stated that they recognized that an essential part of the agreement was that it was to be without prejudice to our appeal or to our rights in the matter, and that they intended to honor that agreement,

but that, in view of *Little vs. Bowers,* they thought that the whole matter should be set before the Court.

We thereafter read *Little vs. Bowers* and the other authorities which counsel for the railroad company had submitted, and endeavored to find further light on the question. We gave the matter as thorough consideration as we could, for, as put to us by the attorneys for the railroad company, the question had two important aspects: (1) The duty of attorneys to this Court to put the matter fully before the Court when question about it arose; (2) The obligation of counsel for the railroad company to carry out in deed and in word the agreement that the arrangement entered into was not to prejudice in any manner or form the rights of the Fullerton Company on appeal to this Court, and the duty of its counsel toward his client to see that no prejudice in prosecution of the appeal did in fact result to the Fullerton Company.

From this consideration of the problem as put to us by counsel for the railroad company, we came to the conclusion that the matter should be treated as equity might treat an agreement vitiated by mutual mistake or other factor rendering an agreement voidable, and stated that conclusion to Mr. Root and his associates, namely: (1) That the arrangement entered into should be rescinded, we to deliver back to him what we had received and they to return to us what they had obtained; (2) That we should then draft and execute a joint statement to be sent to this Court, setting forth fully what we had done. We formally offered to counsel for the railroad company to deliver back to the railroad company what we had received and to fully carry out our part in such a handling of the matter, our purpose being to make clear against any possible question, what we knew to be the fact, that there had been and was no intent

on either side to affect the merits, the genuineness, or the reality of the controversy in any manner whatsoever.

To our surprise, after communicating with their Chicago office, counsel for the railroad company refused to accede to our views, and refused the offer we made to them. No reason for such refusal was then given or has since been afforded to us.

Counsel for the railroad company thereafter showed to us a draft of a statement of the matter which they proposed to send to this Court, substantially in the form sent on or about August 18, 1930. They stated that they were willing to have us join in this statement, but that they did not see their way to change it in any substantial particulars. We gave the matter further consideration, for we then thought and still believe that under the circumstances a statement of such a matter, in fairness to both sides, should be a joint one. We concluded that protection of the rights of the Fullerton Lumber Company was incompatible with accession on our part to the proposals of counsel for respondent. Accordingly, after giving us notice, counsel for the railroad company acting alone sent to this Court their statement dated August 18, 1930.

We cannot agree that that statement fully gives the facts. It does not (1) show what the circumstances were under which the Fullerton Company paid to the railroad company "an amount equivalent to that required by the judgment in the Court below" and (2) it wholly omits to state what the railroad company paid to Petitioner, and that whatever was done was done at the instance of Mr. Root.

The facts are these:

On behalf of the Fullerton Lumber Company, the losing party in both lower courts, we filed our Petition for a Writ

of Certiorari with the clerk of this Court on February 14, 1930. On February 18, 1930, and before service of this Petition had been made on counsel for the railroad company, Mr. F. W. Root, head of the Minneapolis branch of the legal department of the Milwaukee, telephoned an officer of the Fullerton Company requesting a conference to consider this check controversy. Such a conference was arranged and, at the request of the Fullerton Company, the undersigned was present. At that conference, Mr. Root stated that he spoke for Mr. Dynes, general solicitor at Chicago. He then proceeded to make in substance the following proposal:

> "Mr. Dynes, general solicitor of the railroad, has suggested to me that if possible we resolve our difficulties about this check case to such extent as we can at this time, and on behalf of the Milwaukee, we offer to pay you the sum of $375.96, the amount of the original freight bill, plus interest, which would be the outside amount you might be able to collect from us, as damages for alleged mishandling of the check, provided that you pay to us in return therefor the full amount specified in the judgment in the Circuit Court of Appeals. We hope that you won't prosecute your appeal further if we do this, but we won't insist upon that, and this will save you from bringing a separate counter suit against us under the proviso in the Court's opinion allowing you to do so."

In response to this proposition, Mr. Curtis, secretary of Fullerton Lumber Company, stated that it appealed to him because it obviated the expense and trouble of a separate suit for damages which the decisions below left open to his company. He refused, however, to accept it unless it met with the approval of the undersigned, as attorney for his company.

Mr. Root then stated again that he hoped we would not wish to press an appeal. I stated, however, as attorney for the Fullerton Company, that we had just filed our Petition for Certiorari and that we would hardly wish to enter into any arrangement now to dismiss our appeal, although we would consider it, but if he would agree that it was to be absolutely without prejudice to our prosecution of our appeal to the Supreme Court, then I would approve his proposed arrangement on the ground that it obviated bringing the separate suit allowed to us by the courts below in the event that their decisions were affirmed. Mr. Root stated that he would so agree. His proposal was then agreed to and carried out. He delivered to the Fullerton Company a check drawn by the Milwaukee Railroad, payable to the Fullerton Company, for $458.67, being $375.96, the amount of the original check, plus interest to February 20, 1930, together with a satisfaction of the judgment and the Fullerton Company delivered to Mr. Root for the Milwaukee its check for $524.72, being the amount of the judgment plus interest.

Our Transcript, Petition for Writ of Certiorari and Brief, and Notice of Filing in this Court, were later served on Mr. Root on the afternoon of February 18, 1930.

It was the understanding of the Fullerton Company thereafter that its rights on appeal were fully protected, and that it had the following alternatives: (1) It could file the satisfaction and dismiss the Petition to this Court, and be under no further liability; (2) It could go on with its appeal and, in the event the Petition for Certiorari was denied, pay to the Milwaukee Railroad such further amount as would be required by the judgment thereafter entered; (3) In the event that Certiorari was granted by this Court, it could prosecute the appeal on its merits, and such further payment, following the final decision, would be made by either

side to the other as would be required to settle the amount then due.

It was clearly the understanding that the payments agreed to on February 18th were not to be final on either side if the Fullerton Company chose to go on with its appeal. There was no detailed written agreement covering the matter, but the understanding was clear that, if the Fullerton Lumber Company decided not to prosecute its appeal any further, then the February 18th arrangement was final. But if the Fullerton Lumber Company decided to go on with its appeal, then the appeal was to go on without prejudice of any kind, and, depending upon the final decision of the Supreme Court of the United States, the controversy was to be ultimately settled by such additional payment to be made by either side to the other as should be required by the terms of the final decision of this Court.

We promptly notified Mr. Root that the Fullerton Company would go on with its appeal to this Court, and counsel for the railroad company duly filed their brief in opposition to the Petition for Certiorari.

On March 17, 1930, this Court granted our Petition for Writ of Certiorari, and a few days later we learned that this Court had decided the case of *Chicago & Northwestern Railway Company vs. Lindell,* 281 U. S. 14, on February 24, 1930, favorably, as we think, to our contentions on the counter-claim point.

Nothing further was said or done by either side with respect to the arrangement entered into on February 18, 1930, for more than six weeks thereafter, until, on or about April 10, 1930, the question was first raised by counsel for the railroad company of the propriety of that agreement, and whether the controversy had not been thereby made a moot case.

We can state for the Fullerton Company, Petitioner herein, that at no time was it ever intended to make this case a moot one, or to affect in any way the genuineness and the reality of the controversy, that the arrangement entered into on February 18, 1930, was not a final settlement of this controversy, that we did not abandon our rights of appeal, and that our only purpose in entering into it was to avoid the expense and difficulty of a separate action for damages in the event that the ultimate decision should be against us and the decisions below be affirmed.

Respectfully submitted,

STANLEY S. GILLAM,
Attorney for Petitioner,
535 Metropolitan Bank Building,
Minneapolis, Minnesota.